BABA-ALI v. THE STATE OF NEW YORK, #2009-036-400, Claim No. 087328

Synopsis

This is the court's decision on damages in an action under § 8-b of the Court of Claims Act for wrongful conviction following the decision of the Appellate Division (*Baba-Ali v State of New York*, 20 AD3d 376 [2d Dept 2005]), granting claimant summary judgment on the issue of liability. The court awards claimant a total of $2,093,420 in damages as fair and reasonable compensation as a result of his wrongful conviction of rape and sexual abuse of his four- year old daughter and his confinement in prison for 783 days. The award consists of pecuniary damages in the amount of $343,420 for lost past and future earnings, and $1,750,000 in non-pecuniary damages for claimant's mental anguish and degradation occasioned by being labeled a convicted child molester of his own four-year old daughter, for the irretrievable loss of his relationship with his daughter, for his loss of liberty to the most fearsome maximum security prison environment, and for the post-incarceration psychological damage he has been made to live with as a result of all this.

Case Information

UID:	2009-036-400
Claimant(s):	AMINE BABA-ALI
Claimant short name:	BABA-ALI
Footnote (claimant name) :	
Defendant(s):	THE STATE OF NEW YORK
Footnote (defendant name) :	
Third-party claimant(s):	
Third-party defendant(s):	
Claim number(s):	087328
Motion number(s):	
Cross-motion number(s):	
Judge:	MELVIN L. SCHWEITZER

Claimant's attorney:	LAW OFFICE OF PETER WESSEL By: Peter Wessel, Esq. HARRIS & PANELS, ESQS. By: Michael W. Harris, Esq. BOND, SCHOENECK & KING, PLLCBy: Carl Rosenbloom, Esq.
Defendant's attorney:	ANDREW M. CUOMO, ATTORNEY GENERAL By: Gail Pierce Siponen, Esq. Assistant Attorney General
Third-party defendant's attorney:	
Signature date:	March 16, 2009
City:	New York
Comments:	
Official citation:	
Appellate results:	
See also (multicaptioned case)	

Decision

Claimant Amine Baba-Ali was wrongfully convicted on charges that he sexually abused his 4-year old daughter, including rape and sodomy. He was imprisoned for over two years – 783 days – on multiple concurrent sentences, the longest of which was for 8-1/3-25 years, primarily in maximum security prisons, before his conviction was reversed on grounds of ineffective assistance of counsel and prosecutorial misconduct (*People v Baba-Ali*, 179 AD2d 725 [2d Dept 1992]). As prosecutors prepared to re-try him, it was confirmed that the only witness who had presented evidence of such abuse had lied and, in fact, that there was no credible evidence his daughter ever had been molested. The indictment against claimant then was dismissed. He subsequently commenced this action for unjust conviction (Court of Claims Act §8-b). His motion for summary judgment on the issue of liability initially was denied by another judge of this court but ultimately was granted by the Appellate Division, Second Department, which concluded that he had satisfied the requirements of the statute, including providing clear and convincing evidence of his innocence (*Baba-Ali v State of New York*, 20 AD3d 376 [2d Dept 2005]). This decision relates to the trial on damages. **[1]**

Background

Claimant is a native of Algeria who was raised in France and lived for several years in Sweden. He came to this country in 1982 when he married his first wife, Katherine, whom he met when she visited Paris. Their daughter, Anna, was born in 1983. In early 1988, while claimant and his wife were going through an acrimonious divorce and custody/visitation battle, claimant's wife and her mother, who was taking care of Anna at the time, made accusations that claimant had sexually abused his daughter, then 4 years old, during one or more unsupervised visitations. As soon as the accusations were made, a restraining order of protection was issued which prevented claimant from having any contact with his daughter and,

except for brief contacts necessary because of ongoing lawsuits, the last time claimant saw Anna was February 7, 1988. A physical examination of the child by a private physician was inconclusive, and subsequent examinations at two medical centers revealed no evidence of any such abuse. Three months after the allegations had been made, however, another physician, Dr. Nadine Sabbagh, examined Anna and concluded she had been the victim of serious sexual abuse that had occurred 12 to 15 weeks earlier. She stated she found evidence of "multiple vaginal and anal penetrations" which had caused stretching and still apparent discoloration and bruising.

Claimant was arrested on June 28, 1988 and released on his own recognizance. A month later, he was indicted by a Grand Jury for rape, sodomy, sexual abuse, incest and endangering the welfare of a child. Although these most serious charges were traumatic and claimant was distraught that he could not see his daughter, he testified at trial that he remained confident they would be resolved in his favor because he knew he had done nothing wrong. The divorce proceedings were concluded in mid-1988, but, because of the pending criminal charges against him, the order of protection preventing him from seeing Anna remained in force.

Although claimant had surrendered his passport as a condition of his release from jail pending trial, he nevertheless acquired a second passport and traveled to France in August 1988, when he learned that his father was dangerously ill. He explained that he realized this was a risk but nevertheless had made the decision to go and then deal with the consequences. When he was informed by his attorney that a bench warrant for his arrest had been issued, he returned to the United States and was jailed at the Queens House of Detention for over a month. Except for the month in jail, he continued to work and to live a fairly normal life.

At the non-jury criminal trial which commenced on October 10, 1989, the medical evidence presented by the prosecution consisted of testimony from the first private physician whose examination had been inconclusive and from Dr. Sabbagh, and records from only one of the two medical centers where examinations had been conducted. The testimony given by Anna, who by then was six years old, was very equivocal as to whether any abuse had occurred and did not implicate her father. On November 15, 1989, primarily on the basis of Dr. Sabbagh's testimony about her findings, claimant was found guilty of the crimes with which he had been charged. On December 5, 1989, he was sentenced to multiple concurrent sentences, the longest of which were two indeterminate terms of 8 1/3 to 25 years.

With support from claimant's family and the woman who ultimately became his second wife, claimant appealed the conviction, eventually winning a reversal on January 15, 1992, on grounds of ineffective assistance of counsel (failure to call the medical center doctors who had found no evidence of abuse; failure to timely pursue discovery of all medical records) and prosecutorial misconduct (failure to present exculpatory evidence to the Grand Jury and withholding of potentially exculpatory evidence until the eve of trial [*People v Baba-Ali*, *supra*]). The appellate court ordered that a new trial be held. Claimant was released from prison on January 27, 1992, which was 783 days (or 2 years, 1.7 months) after he had been sentenced. Given that a new trial had been ordered, a second order of protection was added on February 5, 1992 by the Supreme Court (Ex. 21C), which continued to prevent him from seeing his daughter for the duration of the still pending criminal case. In May 1992, as the Queens County District Attorney's office was preparing for a new trial, claimant's daughter was again given a physical examination at a New York hospital. There it was discovered that her hymen was still intact, thus directly discrediting the testimony of Dr. Sabbagh. In light of this evidence and the fact that Dr. Sabbagh's findings had been the only evidence of

claimant's guilt, the indictment against claimant then was dismissed.

On May 26, 1993, claimant filed a claim pursuant to Court of Claims Act § 8-b seeking damages for unjust conviction and imprisonment.**[2]** Defendant moved pursuant to CPLR 3211 (a) (7) to dismiss for failure to state a cause of action and claimant cross-moved for summary judgment. The Appellate Division, Second Department, granted claimant's motion for summary judgment, reversing the trial court and finding the State liable. This was the first time in the history of the unjust conviction statute since it was enacted in 1984 that the Appellate Division, on a motion record, found that claimant had satisfied all requirements of § 8-b – including, of course, his innocence – by clear and convincing evidence without defendant having raised an issue of fact warranting a liability trial. That this appellate court finding was made in a case that did not involve DNA evidence is all the more remarkable. The Appellate Division's observations pertaining to liability bear repetition as this court turns to the issue of damages here:

During "an extremely unpleasant and highly bitter divorce and custody battle" (*People v Baba-Ali*, 179 AD2d 725, 578 NYS2d 633 [1992]), the claimant was accused by his estranged wife of raping and sexually abusing his then four-year old daughter. By judgment of the Supreme Court, Queens County (Cooperman, J.), rendered December 5, 1989, the claimant was convicted of two counts of rape in the first degree, two counts of sodomy in the first degree, four counts of sexual abuse in the first degree, two counts of incest, and three counts of endangering the welfare of a child for acts involving his daughter.

The claimant demonstrated that this court's reversal of his conviction was based, in part, on the ground that the judgment was procured by prosecutorial misconduct that was tantamount to fraud (*see* CPL 440.10 [1] [b]). The prosecutor's deliberate withholding of evidence which tended to exonerate the claimant constituted a "fraudulent act," which is "[c]onduct involving bad faith, [or] dishonesty," (Black's Law Dictionary 687 [8th ed 2004]), as well as a "fraud on the court," which is "a lawyer's . . . misconduct [in a judicial proceeding] so serious that it undermines . . . the integrity of the proceeding." (*Id.* at 686). The claimant also demonstrated that the dismissal of the indictment, at the request of the *People*, was based, in part, on newly-discovered medical evidence (*see* CPL 440.10 [1] [g]).

At the claimant's criminal trial, his daughter did not specifically implicate him, and her pediatrician could not conclude with any degree of medical certainty that she had been sexually abused [citation omitted]. The only evidence of his guilt was the testimony of a Dr. Nadine Sabbagh, who found, *inter alia*, that the claimant's daughter was missing her hymen. However, this court noted that her estimation of when the sexual abuse occurred was as consistent with the claimant's innocence as it was with his guilt [citation omitted]. The claimant introduced medical records of two examinations, conducted at the request of the child's mother about a week after the claimant's last contact with his daughter and before Dr. Sabbagh's examination of the child, indicating that no signs of sexual abuse were found and that the child's hymen was intact. These medical records, when considered in conjunction with a post-conviction medical examination of the child, conducted on behalf of the *People*, finding no evidence of the sexual abuse reported by Dr. Sabbagh and contradicting her conclusion that the child had no hymen, completely discredited her findings, the only evidence of the claimant's guilt. In opposition to the claimant's *prima facie* showing of entitlement to summary judgment, the defendant failed to raise a triable issue of fact [citation omitted].

At trial here, claimant presented testimony and other evidence to document his lost wages; the conditions of his incarceration; the social, emotional and mental impact that conviction and incarceration had on his life; and the loss of his relationship with his daughter.

Lost Wages. When claimant first came to this country, he worked as a bartender and tavern manager in Pennsylvania. When the family moved to New York, because of his wife's employment, he secured a job with R.R. Bowker, Inc., a technical publishing company that primarily produces directories used by libraries and other professionals working with books. He worked in the department that put out Ulrich's International Periodicals, a reference tool database of as many as 160,000 magazines published around the world, which contains information enabling researchers of all sorts to find articles on a particular subject matter.

Claimant was first employed by Bowker in June 1985, as an Assistant Editor, at a salary of $15,000. Claimant is proficient in several languages (French, English, Swedish and Arabic), and his initial assignment was to read articles from France and Sweden and write synopses of them. After one year, he was the only one of eight Assistant Editors to be promoted to Associate Editor. In connection with this promotion, he was given a larger geographic area to cover. A year later he was promoted to Senior Associate Editor, with a salary around $25,000, and assigned to cover Arabic language countries. During this time, he took advantage of on-the-job training programs so that he could learn computer skills, including some programming, that were necessary for advancing in this work. His next promotion was to "Senior Editor," a position which carried responsibility for training Assistant Editors, serving as principal proofreader, and providing some supervision, as well as continuing to work on articles. In the middle of 1989, despite the time he had spent away from work in late 1988 because of his unauthorized trip to France, claimant was promoted to Editor and put in charge of the entire production of Ulrich's, supervising a staff of 12 to 15 people.

As claimant's criminal trial drew near, however, and he became concerned that facts were being misrepresented and the charges against him might be believed, claimant's work was adversely affected. Claimant acknowledged he had to take significant time off to prepare for his trial and that increasingly he was having problems with lack of focus and concentration. At an examination before trial, claimant also acknowledged that drinking may have played a role in his behavior during this time. He was terminated by Bowker on October 11, 1989, a day after the trial began, for excessive absenteeism and tardiness. (Ex. 15)

One of his former supervisors, Jacqueline Mullikin, testified at trial that she was an editor and production editor at Bowker when claimant first came to the company. Her description of the overall work involved agreed with claimant's. She recounted how claimant immediately comprehended the work involved and was able to perform what was required with little trouble. As claimant grew more experienced, he often helped newer employees learn the job. She had taken part in his second evaluation after his two years on the job, and she observed that he was rated as one of the better performers in the department, someone who could be relied on to perform work of good quality. In particular, it was noted that claimant took advantage of on-the-job training which had been made available and that he was good at training others. Bowker's decision to promote him to Senior Editor, a decision in which she participated, was based in good part on his ability to deal well with people and his supervisory skills. Ms. Mullikin was claimant's direct supervisor for approximately one year before she moved to another employer in early 1989. She testified that she had considered claimant more as a colleague than someone who needed supervision and referred to him as her "right hand man."

Ms. Mullikin was unaware of specific qualification requirements for the positions of Assistant or Associate Editor but stated the position of Senior Editor required a bachelor's degree. She had no direct knowledge about claimant's background in that regard, but simply assumed the requirement had been met. Claimant, who came to this country in 1982, acknowledged that the resume he developed when he first moved to New York City included the statement "Graduate of the Univ. of Sorbonne" when, in fact, his educational background included only several years at that school and two years at an electrical technical institute. When asked on cross-examination what would have happened had it been discovered that claimant did not have a B.A., Ms. Mullikin stated that he almost certainly would have remained in the Senior Editor position because he already had proven himself and acquired the necessary skills. In fact, she noted, Bowker's managing editor did not have a college degree. Ms. Mullikin also did not think claimant would have been in trouble had it been learned he misstated his educational qualifications on his application.

Ms. Mullikin was aware that by the time claimant was released from prison, Bowker had moved its operation to New Jersey, and she knew of only one other company, Oxbridge, that did similar work. She acknowledged, however, that there might be smaller publishing companies like Bowker of which she was not aware. It was her opinion that the language, computer and managerial skills claimant acquired at Bowker should be transferrable to a number of different types of businesses. **[3]**

Claimant testified about his efforts to find a job following his release from prison in late January 1992. Initially, he felt unable to leave his home for several months. By July, however, he began a job search by sending resumes to publishing firms, and then to hotels, hoping to make use of his language and managerial skills. He did not apply to Bowker because the company had moved to New Jersey and his two closest contacts were no longer there. Claimant could not recall precisely how many resumes he sent out but, in response to questions, he said there were more than a dozen and less than 100. **[4]** Some of them were sent to employment agencies. One of the most limiting aspects of his job search was his need to locate employment fairly close to his home in Manhattan. He explained that he felt, and still feels, he is not able to be in crowded, enclosed spaces such as buses or subways. All of the jobs he has held since his release have been within walking distance of his apartment.

In addition to sending out resumes to selected employers, claimant applied for a number of positions which were listed in the classified ads. He was turned down for one such position, work as a census taker, because of his prior incarceration. (Ex. 25) If this was a factor in his being turned down for other positions, he was not directly informed. After having no success obtaining a publishing or hotel job, claimant began looking for work in restaurants and ultimately held several different jobs in that field during the period from 1993 to 1999. Toward the end of 1999, he was hired for the waterfront crew of the South Street Seaport Museum. This job involved restoring and maintaining old ships and required him to learn carpentry and other new skills. He enjoyed the work very much, especially since it allowed him to work outside. In June 2004, however, he was laid off when the Seaport Museum lost funding.

After collecting unemployment for a month or two, he took a $7 an hour job as a parking attendant for Pro Park (formerly Edison Parking) at the Seaport. At first, his income on this job was less than he would have been receiving on unemployment, but after two months he was promoted to Assistant Manager, at $10 an hour. Later he was promoted to Manager, a position that carries a $45,000

annual salary and includes benefits. He testified that he anticipated continuing in this job or one like it, stating he sometimes has difficulty concentrating and suffers from loss of memory. He testified that, as a result, he feels it would be impossible for him to work again in jobs in the publishing industry or other work which would require attention to detail; "I can't do that," he said. He also said he feels uneasy about the idea of being in an enclosed office setting. To establish his income both before incarceration and for the period of time since his release, claimant submitted certified copies of his New York State tax returns and his W-2 forms for the years from 1987 to 2005, excluding the time he was incarcerated. (Exs. 22, 8A-8F, 9A-9J)

Claimant's economic expert, Dr. Jerry Miner, an economist and professor emeritus at Syracuse University, performed an analysis of claimant's lost earning capacity. To carry out this task, he examined claimant's tax returns, his work history, Social Security records and Bowker personnel records. He also considered information provided to him about claimant's need for future psychological counseling. His overall plan was to determine what claimant's earning capacity would have been from the time he was incarcerated to the present day and to project his future work expectations had he not been incarcerated; then to subtract from those totals claimant's actual and projected post-release earnings. His conclusions were presented in tabular form in Ex. 14.

Based on claimant's earnings for the first ten months of 1989, Dr. Miner projected that claimant's salary for the entire year would have been $27,865. He determined that the position claimant held at Bowker would be considered "Editor II" in the terminology used by the Economic Research Institute (ERI), basing this on his review of documentation and conversations with Jennifer Mullikin. The position of Editor II is described by ERI as a "technical editor" or "technical product editor," one who directs and coordinates writers in preparing technical, scientific, medical or other material for publication with or independent from manufacturing, research or other related activities. Had claimant been able to stay in such a position, he would have had 20 years experience by the time of trial. Someone in an Editor II position with 16 years experience would have been making a salary in the neighborhood of $75,000, and if adjusted for claimant's four additional years of experience, his projected income at the time of trial would have been $79,702. Using these figures, he calculated a 6.38 per cent average annual rate of increase. Reducing the amounts by 2 per cent for periods of potential unemployment found in the field, and adding a standard 4.5 per cent for fringe benefits, Dr. Miner calculated claimant's total past earnings loss to be $899,815.

Dr. Miner calculated claimant's projected future earnings, again based on an Editor II position, by incorporating a 3 per cent rate of inflation (the rate projected by Social Security Administration trustees) and a 1.5 per cent factor for experience (as used by ERI), reducing by 2 per cent for periods of potential unemployment, and adding 4.5 per cent for fringe benefits. Dr. Miner concluded that claimant's projected future earnings would have been $1,477,273 were he to work until age 63 (a period of 14.37 years), which is the end of his statistical work life, and $1,923,957 were he to work until age 66, with adjustment made for survival probabilities. From these figures Dr. Miner deducted claimant's actual past earnings ($273,133) and his projected actual future earnings ($609,219 if age 63 or $776,842 if age 66). Claimant's lost earnings thus would consist of $626,681 for past earnings and future earnings of $868,054 if he worked to age 63 or $1,055,731 if he worked to age 66.**[5]**

On cross-examination, Dr. Miner stated he had considered claimant's educational background to consist of 3 years at the University of Paris and some additional technical education in electronics. He gave no weight to the fact that

claimant had been terminated from his position at Bowker for absences and tardiness because, in his opinion, those problems were related to the criminal prosecution and upcoming trial. Dr. Miner defended his selection of an "Editor II" position from the ERI descriptions because such a job involved making editorial decisions and reviewing drafts. He acknowledged, however, that he had no reason for concluding claimant had been involved in meeting with customer representatives or assigning writers, other skills that are included in the ERI description. He conceded that the job titles relating to publishing in ERI might have little relevance to those who worked in the very specialized field of technical publishing. He did not meet with anyone at Bowker to ascertain what positions at the company, if any, they believed equated with Editor II. Nevertheless, on redirect Dr. Miner persisted in his judgment that the ERI description of an Editor II position, located in New York City, was the closest to the job claimant actually held at Bowker when he was fired on October 11, 1989, even if some of the duties were not exactly the same.

Incarceration. Following his conviction, claimant was transferred to the intake center, Downstate Correctional Facility, where a Ms. Waldron was assigned as his Department of Correctional Services (DOCS) counselor. Claimant already was anxious and fearful as he had been unable to sleep well while housed at the Queens House of Detention. His fears became even greater once the counselor, as well as his attorney, told him it would be "detrimental to his life and health" if other inmates were to learn about the nature of the crime for which he had been convicted. In prison, he was told, child molesters are called "tree jumpers" and are considered to be the lowest of the low of all inmates. If someone is known to have been a child molester, he is subject to rape and assault, often extremely violent. For this reason, claimant continued to be afraid for his life the entire time he was in prison "from the first day to the last." For his protection, he made up a cover story and, if asked, he told people he was convicted of dealing drugs and assault.

Claimant was assaulted while he was at Downstate, although this was not related to his status as a child molester. As he was waiting for a shower, another inmate, whom he believed to be mentally ill, struck him on his cheek and eye so badly that blood was coming out of his eye. He had to be transported to the hospital and have the wound sutured. His departure from Downstate was delayed by several months while he recovered. He reported this assault and the assailant was prosecuted.

He then was transferred to Sing Sing, a maximum security facility for inmates serving long sentences, and assigned to B Cellblock. This is one of the largest cellblocks in the entire prison system, a 5-tier structure with caged housing which holds approximately 2,000 inmates. His cell was 6 feet by 9 feet in size and consisted of three solid walls and a fourth, the front wall, comprised of bars only. As a result there was never full privacy. The cell was equipped with a metal sink and toilet and a bed with a thin mattress. He stated that he slept with his head near the toilet, which was on the back wall, because he felt safer than sleeping with his head near the bars. Sleep was very intermittent in any event, as he would wake every hour or so. He frequently had nightmares, most often of drowning in the middle of an ocean or being pursued by a giant claw. These nightmares, which had begun when he was at the Queens House of Detention, continued for many years after his release.

One of the more searing experiences while he was at Sing Sing was witnessing a young prisoner gang-raped several times over a period of days in a nearby cell, while a correction officer stood nearby and did nothing to stop it. He also saw an inmate being stabbed in the prison yard. A metal shank was used and the inmate was stabbed so many times, more than 50, that he looked like "Swiss cheese" and

bled from every part of his body. On that occasion, claimant ran away because he was terrified that he would be hit by a bullet from correction officers and, in fact, shots were fired. Claimant stated that he also witnessed a number of mess hall assaults and, either at Downstate or at Sing Sing, saw another inmate stabbed in the eye while waiting in the chow line, so violently that the victim's eyeball was hanging down on his face.

When he was examined by defendant's psychiatrist, Dr. Paul Nassar, prior to this trial, he provided additional details about his stay in prison. He said his problems sleeping were related to fears he would be attacked by violent inmates while in his sleep. An overriding fear was with him all the time that he never would get out of jail and would die there. In general, he simply tried to keep his mouth shut and not get involved in the affairs of other inmates. He said he volunteered to work in the AIDS ward because this removed him from the most violent inmates, and he used his language skills, especially Arabic, and his knowledge of Islam to help other inmates interested in these subjects, possibly as a way to obtain some degree of protection. Part of his motivation in availing himself of the college education that was offered him was to be able to stay away as much as possible from the threat of violence.

Dr. T. Richard Snyder, who has been involved in the pastor's program at Sing Sing Correctional Facility since 1983, testified regarding claimant's participation in a 42 credit program which resulted in a Master's of Professional Studies. This theology course is designed for persons not seeking ordination, and graduates often serve as lay leaders in their denominations or, in the prisons, as chaplains' assistants. The course was conducted under the auspices of the New York Theological Seminary and its content was the same as that offered in the school's regular program. It was a fully accredited school program, recognized by the State.

In 1991, claimant submitted an application for this program and following an interview and written essay, with permission of the Superintendent, he was accepted into the program. To qualify for the program, an inmate had to have a BA or BS degree, a willingness to work in a faith community in the prison, an interest in and ability to perform the course work, and potential to function effectively as a chaplain's assistant. Although claimant did not have a formal degree, he was accepted under a "ten percent rule" which permitted a small number of non-degree students to participate. The program was limited to those who excelled in the interview and on a written essay.

Dr. Snyder testified that claimant did well in the program, receiving high scores on his tests and essays and participated in class discussions. He described claimant as being thoughtful, quiet and able to express himself best in writing. Claimant received his degree on June 19, 1991 and Dr. Snyder was present at his graduation ceremony. Dr. Snyder also testified on claimant's behalf at a previous trial. Although he never spoke with claimant about the possibility of his going further with his education to obtain a 90 credit hour degree resulting in a Master's of Divinity, he said he would readily have given claimant his encouragement and a positive recommendation. Dr. Snyder stated he did not know of the nature of claimant's conviction because he did not inquire, although he was aware it must have been a serious crime because claimant was serving a long-term sentence.

In the fall of 1988, after claimant's separation from his first wife, Katherine, and approximately a year before his conviction, he had begun dating a woman named Lillian. She remained supportive throughout his imprisonment and it was she, along with his brother, who pressed the appeal that eventually resulted in his release. In June 1991, he and Lillian were married at Sing Sing. Her mother and a

friend of his, who was a police officer, were attendants at their wedding. Although they were married, there was no provision for conjugal visits at Sing Sing. Later, he was transferred to Eastern Correctional Facility, which had a conjugal visit program. But in order to participate in the program an inmate had to acknowledge guilt for his crime and go into group therapy. Because claimant refused to acknowledge guilt for a crime he had not committed, claimant and his wife were unable to participate in the program.

Life After Incarceration. Claimant testified that after his release from prison, he was, and remains, reluctant to venture very far from his apartment, and for the first several months he left his home only rarely and always in the company of his wife, Lillian. Although he had been very outgoing before his incarceration, he no longer socializes with friends and has become quite reclusive, staying close by in the neighborhood. For the most part, he leaves the apartment only to go to work. He has lost touch with many of his old friends, including the friend who had come to prison to attend his wedding. Claimant stated that he avoids crowds and is frightened by large gatherings. He also has strong reactions whenever he sees law enforcement uniforms. He stated that his memories of life inside prison will be with him the rest of his life. For example, whenever it snows, he always thinks of the inmates in prisons who will not be able to go outside. Claimant said he sees his future only as bleak.

The nightmares he experienced in prison continued to occur for several years after his release. They have more or less stopped now, but he continues to wake up at night covered with sweat several times a week. His sex drive, which was normal and very good before his incarceration, seems to have died as a result of being in prison. He stated that he is not sexually interested in his wife but does not really know why. Despite this, he considers his marriage, which has lasted for more than 17 years, to be a very good one. Claimant saw a psychiatrist between 12 to 17 times, paying for the appointments himself, but he was not financially able to continue with therapy. With his recent promotion to a job which carries health benefits, he hoped to be able to resume therapy, although he was not yet certain what coverage was provided.

Claimant's wife, Lillian, testified she met claimant when she was a manager of a restaurant in Tribeca and claimant was a customer. They went out on a date and immediately "clicked." Their dates consisted of activities such as fishing, going to the Central Park zoo, rowboating in Cental Park, going to the movies and plays, and dining out with friends. She described him as being very active and social and someone who had a number of friends. Her relationship with him was affectionate and romantic. Claimant had told her he was divorced and said his ex-wife had custody of his daughter, showing her a picture of Anna. (Ex. 2) She saw toys and some of Anna's artwork when she went to claimant's apartment, adding that those toys and drawings still remain a feature in their home today.

On November 15, 1989, claimant called her from the Queens House of Detention and asked her to come see him so he could explain what had happened. When she saw him the following day, he was disheveled and crying, something she had never witnessed before. She described him as being "in shock" and unable to believe he had been convicted: "It just destroyed him." Prior to this time, she had no idea that he had been charged with any crime or that allegations of sexual abuse had been made against him. Lillian got in touch with his parents around this time, and they also had known nothing of the charges or his trial. It was her belief that he had simply never believed he would be convicted because he knew he had not harmed his daughter.

Ms. Baba-Ali visited him regularly while he was at Downstate, at Sing Sing

Ms. Baba-Ali visited him regularly while he was at Downstate, at Sing Sing (where they were married in 1991) and later at Eastern Correctional Facility in Napanoch. She stated that claimant gained a good deal of weight in prison and had trouble with his cholesterol. She purchased special food on the outside and brought it to him every week while he was incarcerated. Lillian was aware of his studies in theology, and knew that he focused on the course work and on his legal case in order to occupy his mind. Whenever she saw him, he would ask what was happening with his appeal.

Since his incarceration and release, she said, claimant has become reclusive and, in fact, was unable to leave their home for the first six months. He had nightmares for several years but never wanted to discuss them. When they occurred, he suddenly would just wake up, almost jump out of bed, and then simply say he had had another nightmare. He continues to be very restless in his sleep, occasionally crying, and often wakes up sweating. He also startles very easily when he is awakened, to the point that she hesitates to wake him. All of this is a marked change from when they were dating and he had no difficulty sleeping or being affectionate.

Lillian is aware that claimant continues to get nervous if he sees too many people and finds it hard to trust anyone, whereas he was a very trusting person before. He has lost contact with many of his friends, including the person who was best man at his prison wedding, and the only people he sees now are the ones with whom he works. Lillian said it bothers him that he can no longer be generous to others because of financial constraints. While she would have described claimant as an "easygoing" person when she first knew him, he is now often on edge and angers very easily. Holidays, especially Anna's birthday and Christmas, are the worst times for him. She has seen that he becomes extremely anxious whenever something reminds him of prison, even something as innocuous as a uniformed police officer or snow, the latter invariably making him think of the inmates who are not able to go outside. She can tell when he slips back to that time, because he "freezes" and even will stop talking if they are in the middle of a conversation.

He seems to her to have lost the dignity he always exhibited before, and he has told her that "in jail you are just a number; you are nothing." Claimant has problems being confined to small areas and sometimes seems cold, which she described as having "lost his spark." Another new behavior is that he washes his hands repeatedly, sometimes up to 20 times a day, and has a pronounced fear of germs and disease. In the past he worked easily with others and had no difficulty taking directions, but he is no longer comfortable doing that, she thinks because he was told what to do at all times while in prison. Ms. Baba-Ali testified that the last time they had gone to a movie was in 2005 and they have not been to the zoo, on rowboat rides, or to a play since before he went to prison. She described their marriage as "very good," stating she loves her husband very much and knows he loves her. She said she has seen some small degree of improvement in his attitude and behavior during the years since his release, noting that he has become a little more affectionate since they got a dog.

Psychiatric Experts. Dr. Richard G. Dudley, Jr., a Board-certified psychiatrist, testified that he performed an assessment of claimant in October 1994, in connection with claimant's lawsuit against the City of New York. He continued to see claimant as a patient on occasion after that date and issued a supplemental report dated March 19, 2006, in preparation for this trial. Claimant had been referred to Dr. Dudley to determine if he suffered any psychiatric injuries as a result of his conviction and incarceration and, if so, the prognosis for his recovery. In performing his assessment, Dr. Dudley obtained a complete history of claimant's life, his life with his first wife, Katherine, Anna's birth, claimant's employment and

life, his life with his first wife, Katherine, Anna's birth, claimant's employment and other pertinent information; he also met with both claimant and claimant's wife, Lillian.

According to Dr. Dudley, claimant said that at least until shortly before his criminal trial, he had been "certain" the charges against him would be favorably resolved because he knew he had done nothing wrong to his daughter. He was deeply affected and "destroyed" when that belief proved erroneous. Claimant recounted the events that he observed while incarcerated (described *supra*) and spoke of the deep fear he had felt if it ever were discovered that he had been convicted of sexually molesting a child. Inmates who had done that, he explained, were the "lowest of the low" and at constant risk of attack by other inmates. He was convinced that his protests of being innocent would not protect him, and he feared he would be subjected to beatings, raped by other prisoners and would have problems with the guards as well. When asked if he had had any psychiatric treatment while in prison, claimant said he had not.

Claimant reported that prior to being sent to prison he had a very active social life but that after his release, particularly during the first five years, he encountered a number of difficulties interacting with people and was continually afraid something else would happen to him. He was always looking over his shoulder and during the first six months after his release he was not able to go anywhere unless accompanied by his wife. He was, and remains, very jumpy and becomes easily startled whenever he sees a police officer or someone in a similar uniform. On occasion, disturbing memories from prison come back to him, sometimes even interrupting him when he is in conversations with his wife. His sex life, which had been healthy before, has suffered as has his confidence in his ability to work.

As of the 2006 interview, claimant's relationship with Lillian had gotten better, and at no time following his release had they ever separated or had significant marital troubles. Claimant continued to feel bitterness toward Katherine's mother and believed she hated him. He stated to Dr. Dudley that when he and Katherine had separated, her mother offered him money to stay away from Anna and when he refused, she told him, "We'll get you no matter what." When asked about his plans or hopes for the future, claimant said he would like to get out of New York somewhere so he would not have very much contact with people, perhaps to an island off Massachusetts where he could work with boats. "When this case is over, I would like to find a place to just drop out."

Dr. Dudley's diagnosis, based on the Diagnostic and Statistical Manual IV (DSM IV), was post-traumatic stress disorder (PTSD). He felt this disorder was present on the occasion of both evaluations and that the condition was chronic for claimant. For PTSD to occur, according to Dr. Dudley, there must be a traumatic event which is experienced as life-threatening to himself or someone else to which there is a reaction of horror and helplessness, a sense that the person is unable to extricate himself from the trauma. Both the conviction and incarceration and the events claimant witnessed in prison would qualify, the doctor said. A person with PTSD has symptomatic and persistent reactions that are developed as a result of the traumatic event. While these may "wax and wane" on occasion, a person with the disorder will show one or more of the following behaviors: reliving the experience at odd moments either in the middle of normal activity or while asleep; recurrent nightmares; avoidance of things that evoke memories of the event; a depression of responsiveness in general; some impairment of functioning; and hypervigilence expressed in sleep difficulties, loss of concentration, and being easily startled and irritated.

According to Dr. Dudley, claimant's responses since his release from prison fit

According to Dr. Dudley, claimant's responses since his release from prison fit this pattern. He has become socially isolated and withdrawn, has feelings that nothing ever will work out, and is fearful of crowds, subways, and being very far from his home. This latter fear is very limiting and impractical in terms of his employment and his developing a normal social life. Claimant's desire to simply "drop out" of life and avoid interaction with people is symptomatic of PTSD.

In addition to the PTSD, it is Dr. Dudley's professional opinion that claimant has related depressive symptoms, caused particularly by the continuing loss of all relationship with his daughter, Anna. During the 1994 evaluation he had an extremely high level of anxiety about Anna, telling Dr. Dudley at that time that it had been very painful for him to watch her testify at the trial because, while he knew he was innocent of any interference with her, he was very concerned she had been abused by someone else. As time went on, however, he came to believe nothing had happened, although this required dealing with the fact that the gynecologist had lied at his trial. After the reversal of his conviction and release from prison, claimant never was able to learn about Anna's location or condition, and he continually worried about how she would deal with the revelation that the charges had been dropped. He also was concerned about how her mother would present the news to her. Because of Family Court restrictions, he had no way to find out about Anna. Because of the highly emotional nature of the events that had separated them, Dr. Dudley had recommended that if and when a reunion was possible, initial meetings between claimant and his daughter should be held in the presence of a clinician. This was acceptable to claimant but no such meeting ever could be arranged. In addition to anxiety, claimant's worries about Anna also contribute significantly to his depression, in Dr. Dudley's opinion.

The doctor opined that claimant's PTSD was chronic in 2006, although some of the symptoms abated. Claimant received only a small amount of therapy, paying for some counseling sessions with Dr. Dudley himself, at a cost of approximately $100 an hour on several occasions in 1995, and again in 1998 and 1999. He did not have more intensive therapy because he could not afford it. Dr. Dudley stated that if claimant had been able to receive more consistent therapy, he would be doing somewhat better. The doctor was hopeful claimant would be able to begin treatment since he will be receiving health insurance benefits with his recent promotion at the garage.

In Dr. Dudley's opinion, claimant continues to need psychotherapy, possibly in conjunction with medication. He recommended that claimant be seen in counseling twice a week for two to three years in order to receive maximum benefit. After that, claimant probably would need to see a therapist less often, perhaps weekly or every other week, but because he would most likely require ongoing medication, monitoring should continue for the rest of his life. The cost of such treatment, according to the doctor, would be in the range of $125-$200 per hour.

Defendant called as its expert Dr. Paul Nassar, a Board-certified psychiatrist who specializes in domestic violence, custody evaluation, and marital therapy. He testified that he is familiar with PTSD as a result of having worked on a large army base during the Vietnam war. Dr. Nassar first examined claimant on October 23, 1995, in connection with the lawsuit brought against the City of New York. (Ex. 27) In anticipation of this trial, he again examined claimant on September 11, 2006. These examinations, he stated, were "forensic" examinations, directed at finding the cause of an illness present at a given time, and he contrasted them with the more traditional examination in which the emphasis is on treatment, not determining causation.

In Dr. Nassar's opinion, claimant did not suffer from PTSD at the time of either examination. His description of the signs and symptoms of PTSD agreed for the

examination. His description of the signs and symptoms of PTSD agreed for the most part with that of Dr. Dudley. While Dr. Nassar considered claimant's conviction and incarceration to have been "upsetting and traumatic to some extent," additionally so because his conviction was unwarranted, it was not an experience to be perceived as a threat to claimant's very survival. Weighing against a diagnosis of PTSD were claimant's active participation in his incarceration by enrolling in the school program and helping tutor other inmates. The tutoring work, according to Dr. Nassar, was particularly smart because it provided claimant with some degree of protection. In addition, the doctor explained claimant's pursuit of legal remedies such as the appeal of his conviction as a further indication that he did not suffer from PTSD.

With respect to claimant's behavior after his release, Dr. Nassar stated that the nightmares claimant mentioned do not appear to be the type of nightmares suffered in PTSD. He also concluded claimant also does not appear to suffer flashbacks, episodes in which he has the sense he is back in the moment of trauma. A memory is not a flashback, he explained, and what claimant describes are not flashbacks. Also arguing against a diagnosis of PTSD are the facts that claimant has been able to progress vocationally, having become a manager who supervises other employees, and being able to advocate for himself. Someone with PTSD, he emphasized, would not want notoriety or seek to draw attention to himself (see account of claimant's appearance on a Jackie Mason television show to discuss his wrongful conviction and several newspaper interviews he gave, *infra*). Such a person also would not actively feel anger, but instead, would be numb, "closed down," and could not demonstrate appropriate feelings. Claimant, in contrast, exhibited outrage, anger and a sense of injustice, all of which were appropriate to the story he was telling. Dr. Nassar compared claimant to someone who is an 'innocent bystander,' a person who essentially has normal feelings but must react to a traumatic event.

Dr. Nassar also stated that he does not recognize DSM IV as the definitive guide to psychiatric diagnosis, but acknowledged he is a member of the American Psychiatric Association which publishes this reference tool and whose members principally rely on it for diagnosis. On cross-examination, Dr. Nassar agreed that some individuals who indisputably suffered from PTSD nevertheless were able to take adaptive measures during the traumatic event, specifically mentioning concentration camp survivors. He also agreed that someone could have PTSD but still be able to function in some areas of their lives afterwards. While one need not have a generalized inability to cope in order to be diagnosed with PTSD, the greater one's ability to cope the less likely it is that the condition exists. Fear and helplessness must continue to be present, however, according to the doctor.

Relationship with Daughter. Evidence presented at trial indicated that prior to the allegations against him, claimant had enjoyed a close relationship with Anna. Susan Meade, who had also testified on claimant's behalf at the Family Court custody proceeding, stated she first met claimant's family in June 1987 when she was a housewife in the neighborhood where claimant and Katherine had purchased a home. The realtor who sold claimant his house had recommended her as someone who did babysitting. The Baba-Alis attended several of the same neighborhood gatherings, and Ms. Meade's son often played with Anna. From June until November, 1987, she babysat Anna four or five days a week. Most often it would be claimant who brought the child to her in the morning and picked her up in the evening.

Anna was always clean and neatly dressed and groomed, Ms. Meade noted, and a "joy to be around" who did not really need much discipline. She never saw claimant discipline his daughter, and she never saw bruises or other signs of physical trauma on Anna. The child never said anything shocking or reported

physical trauma on Anna. The child never said anything shocking or reported inappropriate events. Neither parent ever indicated to Ms. Meade that they had concerns about the welfare of the child. She described Anna as a happy child, who did not get upset when her dad dropped her off but was always glad when he picked her up. Anna appeared to be very happy when with him, and whenever she asked for a parent, typically it was her father that she mentioned. Ms. Meade said claimant frequently would call during his lunch break just to speak to Anna and see how she was doing. Ms. Meade considered him to be a very concerned father and said claimant once told her Anna was the most important thing in his life.

In November 1987, Ms. Meade became aware the family was undergoing a separation or divorce when Katherine told her they were not getting along and said claimant beat her. Ms. Meade saw no bruises or cuts on the wife. Katherine also had approached Ms. Meade and asked if she could move in with her, stating that the "police are looking for me." During this time, Anna had told Ms. Meade she would be living either with her mother or her father and that if she lived with her mother she was not going to be allowed to see her father.

Ms. Mullikin, claimant's supervisor at Bowker, also had testified that on four or five occasions claimant brought his daughter to work when the babysitter was unavailable. Ms. Mullikin never observed any conflict between them, or even heard raised voices. Anna behaved very nicely, she said, and was charming, very pretty, and always neat and well-groomed. She never observed any bruises or signs of abuse, and she said Anna never spoke inappropriately. Claimant always was extremely proud of his daughter and kept a photograph of her in his cubicle. In Ms. Mullikin's opinion, claimant was a "doting" father who was justifiably proud of the way his child behaved. On the one occasion when claimant and his friend were at Ms. Mullikin's house performing some work, Katherine called and Ms. Mullikin heard the child crying in the background. Claimant then spoke with his daughter over the phone and calmed her down.

Dr. Azariah Eshkenazi, a forensic psychiatrist who has testified in the past as an expert witness, was called as a fact witness by claimant. In 1987, at the direction of Queens County Supreme Court, he met with all members of claimant's family in connection with the ongoing matrimonial action. On December 22, 1987, and again on January 7, 1988, he met with Katherine who told him claimant had struck her and pushed her, and that he was an angry person who had no patience with their daughter. She did not, however, suggest there had been any physical abuse of Anna by her father. Katherine, he stated, had nothing good to say about her husband and indicated she wanted full custody of Anna with no visitation or custodial rights for her husband. She was adamant that claimant was not a "good man" and portrayed him as a drug addict.

On January 25, 1988, the doctor met with Katherine and her daughter together, and then separately with Anna. He felt that the interaction between mother and daughter was warm, loving and close. At the time, Anna was four and one-half years old, a very pretty girl who impressed him as intelligent and articulate. It was also his impression that she had been well-coached for the interview, having made inappropriate statements like "My daddy hit my mommy," "My daddy messed up my whole life," and "My daddy is a mean man," and having used language that would not be used by a child her age. When asked where she would prefer to live, she said "I want to live with my mother but I want them to live together." Since Anna was living with her grandparents at the time, Dr. Eshkenazi assumed it was either her mother or her grandparents, or both, that had coached Anna.

On February 4 and February 10, 1988, Dr. Eshkenazi met with claimant, and on March 10, 1988 he met with claimant and Anna together.[6] During his interview

March 10, 1988 he met with claimant and Anna together.[6] During his interview, claimant at first denied he ever had used drugs but, when the doctor confronted him with a positive result on a court-ordered urine test, he reluctantly acknowledged that he had used cocaine, but only "on occasion." Claimant told Dr. Eshkenazi he believed Katherine's parents were poisoning his relationship with his wife and also putting up a barrier between him and his child. Claimant expressed a very strong interest in his daughter and a desire to continue to see and take care of her. Dr. Eshkenazi could not recall whether claimant had been arrested at the time of the interview, but he was aware there had been allegations of sexual abuse. He observed a warm, affectionate relationship between father and daughter, with Anna sitting comfortably on her father's lap. In the private session, Anna used more appropriate language for a little girl her age, but still made some of the same statements regarding her father that are recounted, *supra*. Even while making the negative statements, however, she stopped in the middle of the interview to go out and hug her father who was in the hallway. On that date, when asked about the allegations of sexual abuse, Anna said: "Maybe he put a stick in my hiney. I think it was him." She did not, however, elaborate further. In the doctor's estimation, her statements were inconsistent with his direct observations of the father-daughter relationship, and in his report (Ex. 10), he stated he had "serious doubts" Anna ever had been sexually abused by her father.

Following these meetings, Dr. Eshkenazi submitted his report to the Supreme Court where the matter of custody and visitation were being considered. He recommended that Anna's mother should have custody but that claimant should have visitation rights, supervised initially but moving to unsupervised when it was confirmed there was no more drug use. In his report, Dr. Eshkenazi added, "There is little doubt in my mind that Anna loves her father and indeed, would like to continue and see him."

At this trial, claimant testified he had been in the delivery room when his daughter was born and was allowed to cut the cord and hold her immediately after she was delivered. He described how for the first four years of Anna's life he was the parent primarily responsible for her care. His wife had been going to school in Pennsylvania when Anna was born, while he worked in the evenings. Consequently he was the one who carried out most of the parental chores: giving baths, changing diapers, feeding her, and taking her for walks. He was present when she first learned to crawl and for other early milestones. When Anna was two years old, she traveled with her parents to Paris, and the following year, 1986, she spent the summer with her paternal grandparents learning French. In January 1985, Katherine obtained a job in New York City which involved extensive travel. Claimant and Anna stayed in Pennsylvania for an additional two weeks, while they arranged for housing. Once the family was settled in New York, claimant continued to be the child's primary caregiver.

Katherine filed for divorce in 1987, making allegations of spousal abuse and seeking custody of Anna. The parting was very acrimonious. Before reaching this impasse, she and claimant had gone to several marriage counselors and he individually had seen a counselor for stress-related anxiety and depression. Initially, Katherine moved out of the home, leaving Anna in claimant's care, but later she obtained temporary custody of the child, with claimant having weekend visitations until the conclusion of divorce proceedings. Because of Katherine's work demands, she moved Anna to Pennsylvania so she could be cared for by her maternal grandparents. This made it difficult for claimant to arrange visitations, particularly since he never had a good relationship with Katherine's mother. At one point, claimant had to go to court to enforce his visitation rights, and Katherine was told she would be held in contempt of court if she did not make arrangements for Anna to spend time with her father. She complied, although it required her to

go to Pennsylvania on Fridays, bring Anna back to New York City Saturday mornings, and then make the return trip to Pennsylvania on Sundays. The last time claimant had a visitation with her, and the last time he saw his daughter alone, was on the weekend of February 6-7, 1988. He was supposed to see her the following weekend but agreed to Katherine's request that he forfeit the weekend because it was Valentine's Day and she wanted to spend extra time with Anna. By the following week, the accusations of abuse were made and an order of protection issued February 28, 1988. Claimant's trial, conviction and imprisonment followed.

Upon learning the results of the 1992 examination of his daughter, claimant stated he felt vindicated and also felt tremendous relief to learn she had not been molested by someone else. Until then, he had credited the gynecologist's report and actually thought she had been abused by someone else, even though he knew it was not him. After the indictment was dismissed in May 1992, claimant's attorney Peter Wessel sought to have "any orders of protection that were issued" that precluded claimant from access to his daughter declared no longer in effect. *See* Appendix D to Claimant's Memorandum of Law at p 6.**[7]** In order to do this Mr. Wessel had to obtain the Family Court file because that court had issued an order of protection to remain in force until Anna reached the age of eighteen. (Ex. 26A) The order was missing and could not be located until March 1994. On November 17, 1994, the motion to vacate the protection orders finally could be made but then was opposed by the Department of Social Services (DSS) and Anna's law guardian. In a decision dated July 5, 1995, Judge Cozier of the Queens County Family Court exercised his discretion to excuse claimant's earlier default and ordered a rehearing. This decision was affirmed on January 29, 1996 (*Commissioner of Social Services v Baba-Ali*, 223 AD2d 703 [2d Dept 1996]). After another delay caused by yet another loss of the Family Court file, the original petition of DSS for an order of protection finally was ordered withdrawn with prejudice on July 24, 1997 by Family Court Judge DePhillips. (Ex. 18)

Judge DePhillips recommended that claimant visit with Anna only under the supervision of the law guardian. Attorney Wessel testified that between July 1997 and May 1999, he had numerous telephone conversations and communications with the law guardian, Emanuel Saidlower, Esq. of the Legal Aid Society, in an effort to arrange such visitation. An example of such an effort was contained in Exs. 5A-5C, which are separate letters from claimant and Mr. Wessel that the law guardian had agreed would be forwarded to Anna and her mother. All efforts to establish contact with Anna were futile.

In hopes that his daughter might see him and initiate contact, claimant went on Jackie Mason's television show to discuss his wrongful conviction and afterwards was interviewed by the New York Times and Newsday. Another effort to reach out to Anna was made by claimant's adult son, Martin.**[8]** Although Martin lived in Sweden, he found an address for Katherine on the internet and called. He spoke with a female, whom he believed to be Katherine, and was told "I don't want to talk to him [claimant] and Anna would not want anything to do with him." Claimant testified that he did not ask Martin for the address or phone number because he did not want to be framed again or to be accused of harassing the family. For the same reasons, he never hired a private detective or attempted to perform an internet search on his own. Anna turned 18 in 2002, and while he hoped she would get in touch with him, claimant has made no further attempt to contact her because he believes she wants nothing to do with him.

When asked about losing his child, he said that the loss was and continues to be devastating, like having his heart ripped out: "She was my heart." With no kind of contact with her, claimant testified that he feels helpless and hopeless, and he

continually thinks about having missed out on all of her life: going to school, getting dressed up for a prom, attending graduation. He testified he does not know where she is now, how she is doing – or even if she is still alive.

* * *

The court's findings of fact and conclusions of law follow.

A finding of defendant's liability having previously been made by summary judgment, claimant is entitled to an award of damages "in such sum of money as the court determines will fairly and reasonably compensate him." Court of Claims Act § 8-b (6). An individual who has been wrongfully convicted and incarcerated and who meets the requirements of the statute is entitled to an award of damages, the amount of which is determined in accordance with "traditional tort and other common-law principles" (*Carter v State of New York*, 139 Misc 2d 423 [Ct Cl 1988], *affd* 154 AD2d 642 [2d Dept 1989]). The award is to provide compensation for lost wages, physical or mental problems caused by the incarceration, and pain and suffering, which can encompass the conditions of incarceration (discomfort, fear, lack of privacy), loss of freedom while imprisoned, separation from children, humiliation, interference with personal relationships and damage to reputation (*Johnson v State of New York*, 155 Misc 2d 537 [Ct Cl 1992]; *McLaughlin v State of New York*, NYLJ, col. 4, [Ct Cl 10/27/89]). The relevant period for determining damages is from the date of conviction to the end of imprisonment, and damages also may be awarded for "any subsequent or continuing damages shown to have proximately resulted from those incurred during said period" (*Carter*, *supra*). Time spent incarcerated prior to conviction cannot serve as a basis for an award (*see Fudger v State of New York*, 131 AD2d 136, 140-141 [3d Dept 1987], *lv denied*, 70 NY2d 616 [1988]).

The amount of damages, even for claimants that have been incarcerated for similar periods of time, may vary depending on each claimant's individual circumstances and the course of his imprisonment (*Carter v State of New York*, 139 Misc 2d 423, *supra*). [*See* discussion *infra* rejecting defendant's argument that the court should adhere to a per annum "formula" in making its damage award.] Among the circumstances the court may consider are the stigma attached to the type of conviction, whether the individual previously was incarcerated, the presence or absence of a significant criminal history prior to the unjust conviction and the basis for the prior conviction (a claimant who may not have been guilty of the crime charged but knew he was guilty of something else will suffer less than one who knows he is truly innocent of any wrongdoing, *Johnson v State of New York*, 155 Misc 2d 537, *supra*; *Carter v State of New York,* 139 Misc 2d 423, *supra*). It is also relevant in this case that "[a] parent who has been wrongfully deprived of the company of his child, by interference with such custody, association and companionship, may recover damages from the wrongdoer for the mental anguish and wounded feelings and for the expenses incurred in vindicating the parent's rights to have his child" (*McGrady v Rosenbaum,* 62 Misc 2d 182 [NY Sup Ct 1970], *affd* 37 AD2d 917 [1st Dept 1971], citing to *Pickle v Page*, 252 NY 474 [1930]; *McEntee v New York Foundling Hosp.*, 21 Misc 2d 903 [Sup Ct Kings Co. 1959]; *Tobin v Grossman*, 24 NY2d 609, 619 [1969]; *Lisker v City of New York*, 72 Misc 2d 85 [Sup Ct Queens Co.1972]).

Pecuniary Damages. Claimant relies on the testimony of his economist, Dr. Miner, to support and then compute his claim to lost wages, past and future, as well as for the computation of his claim for the costs of future psychotherapy. Dr. Miner relied on claimant's actual earnings from 1986 to 2005, as evidenced by his W-2 forms from 1986 to 2005 and his tax returns prior to 1989. (Ex 22) As recounted *supra*, Dr. Miner equated claimant's editorial job at Bowker with that of an "Editor II" position as it is defined in a tabulation prepared by the ERI. Defendant did not counter with any expert testimony regarding the issue of lost

earnings, but contends claimant utterly failed to prove his entitlement to both past and future lost earnings because no vocational rehabilitation expert testified to claimant's actual job qualifications or the types of positions available to him given his education and skill set. Defendant's Post-Trial Brief at 31-32. Defendant challenges Dr. Miner's reliance on the Editor II position as the equivalent of claimant's earning capacity, arguing claimant really was not an editor as that term is commonly understood, but rather functioned at Bowker as "essentially [a] data entry" person. Defendant asserts claimant really never had a publishing career, that he entered the field at Bowker "solely because he was looking for any employment that utilized his *language skills*, not any specific skill or interest in publishing." *Id.* at 32 (emphasis in original).

Apart from claimant's education in Paris (which he admitted to have falsely exaggerated on his resume), his fluency in Arabic, French and Swedish may indeed have been what enabled him to obtain an entry level publishing job at Bowker. But thereafter claimant was promoted several times and was well established in a publishing career there by 1989. He testified that when he was promoted to Editor from "Senior Editor" in June 1989, he was given full responsibility for all phases of production of *Ulrich's International Periodicals*, a list and summary of publications in technical fields, where he managed a staff of 12-15 employees. Throughout his employment at Bowker he garnered annual salary increases. Ms. Mullikin, claimant's supervisor and colleague there, confirmed claimant's description of his editorial and supervisory responsibilities. Claimant thus had established a certain earning capacity in this publishing-related field. It is of no moment that he was discharged by Bowker shortly before he was convicted, one day *after* his criminal trial began and ostensibly for repeated absences and lateness occasioned by his need to prepare for trial. The court is of the view that for purposes of past lost earnings, Dr. Miner's Editor II analogue is sustainable.**[9]** Had claimant not been unjustly convicted he most likely would have been able to resume his career path in short order after his acquittal, if not at Bowker then at his same level of earnings in another company where he could have used his publishing-related or other transferable skills.

In awarding past lost earnings, the court accounts for the actual period of claimant's confinement from the date of conviction on November 15, 1989 until his release from prison on January 27, 1992, and also adds a subsequent period through 1999 due to claimant's psychological impairment, that is, for a period when he suffered from the disabling effects of a severe depression which the court finds properly attributable to his unjust conviction/ incarceration. The court credits the psychiatric testimony of Dr. Dudley and claimant's own testimony in this regard.

After claimant was released from prison he was incapable of seeking or obtaining work. Initially, there was the question whether he would be retried which got resolved in May when the Queens District Attorney decided to drop all charges. Claimant, however, was psychologically incapable of leaving his apartment and thereafter could do so only when accompanied by his wife. He also discovered he had become afraid of crowded, enclosed spaces and could not navigate buses and subways. He believed he would not be able to find a job or to perform in one as he had in the past. He was afraid no one would hire him because he would not be able to explain his period of incarceration and people would not believe him. When finally he felt able to conduct some semblance of a job search for an Editor II-type position, it did not bear fruit. He tried to exploit his foreign language skills in the city's big hotels, but came up empty there, as well. Obviously, his was a desultory job search (*see* discussion of lost future wages, *infra*) and the court attributes it to claimant's depression. As Dr. Dudley explained, he had a sense that "his life was never going to amount to anything again."

To resume bringing home some money, claimant reverted to what he did when he first came to this country in Pennsylvania – restaurant work, back to "square one," he said. He managed to work sporadically in restaurant jobs over the next number of years during which he also sought psychiatric help from time to time. Finally, it appears he collected himself sufficiently to take the initiative to work as a weekend volunteer at the South Street Seaport Museum near his apartment. This ultimately led to his landing a full-time position there restoring historic ships and vessels. Claimant found this work satisfying and it appears this is when he regained his equilibrium necessary for him to function productively as he had pre-conviction.

Defendant's psychiatrist, Dr. Nassar, agreed with Dr. Dudley that claimant clearly exhibited psychological problems stemming from his incarceration but explained that claimant brought with him pre-conviction psychological issues from childhood, as well. He had witnessed his father being beaten and had an early sense of victimhood, of helplessness, according to the doctor. Claimant's incarceration "simply solidified" claimant's psychological issues, he said. This may very well account for the length of time it took for claimant to emerge from his depressed state before he once again could attain a semblance of the productivity he had enjoyed when working in the publishing field – albeit now at the Seaport as an artisan of sorts. But the law of torts is well-settled that "an accident which produces injury by precipitating the development of a latent condition or by aggravating a preexisting condition, is a cause of that injury," (*Matter of Tobin v Steisel*, 64 NY2d 254, 259 [1985] [traumatic neurosis with depression]; *Bartolone v Jeckovich,* 103 AD2d 632 [4th Dept 1984] [pre-existing psychosis] ["The circumstances . . . of the case before us illustrate the truth of the old axiom that a defendant must take a plaintiff as he finds him and hence may be liable in damages for aggravation of a preexisting illness. [citation omitted]. Nor may defendants avail themselves of the argument that plaintiff should be denied recovery because his condition might have occurred even without the accident. [citations omitted]"]). The court thus finds this period of earnings impairment to be compensable in that it is directly attributable to a depression caused by his conviction, and awards damages for claimant's past lost earnings capacity amounting to $343,428.1**[0]**

The claim for future lost earnings is another matter, however. A claimant, of course, bears the burden of establishing lost earnings with "reasonable certainty." (*Bielich v Winters*, 95 AD2d 750 [1st Dept 1983]; *Davis v City of New York*, 264 AD2d 379 [2nd Dept 1999]). As this applies to future lost earnings, claimant must establish that his future inability to earn at his pre-conviction/incarceration earning capacity has been proximately caused by those events. (*See Bacigalupo v Healthshield, Inc*., 231 AD2d 538 [2d Dept 1996] [plaintiff must "establish any diminution in earning capacity result[ed] from his injury"]). Claimant has not met his burden with regard to his alleged diminished future earnings capacity.

Claimant testified to what was his *only* effort to find Editor II-type employment following his release from prison. As noted *supra*, it was a desultory one at the depths of his depression when he first was struggling to readjust to the outside world. He described how he sent out letters and resumes, "more than a dozen less than 100" which did not generate any favorable response. He did not attempt to re-connect with Bowker, which by then had moved to New Jersey, and he explained that because his second wife had a job in New York, he would not have sought employment with Bowker under these circumstances. Although he sent resumes to some employment agencies there was no testimony that he sought out the agency specializing in multilingual positions which had gotten him the Bowker job, nor did he testify that he sought out any other such language skills agency. His own search for language-related work was confined mainly to the big hotels in

the city. Except for consulting his lawyer, he did not go to any recruiters or job counselors to help him reenter a publishing-related field or otherwise obtain a position with a similar earning capacity utilizing his language and transferable skills. There is no testimony that claimant ever again sought to find Editor II-type employment or anything comparable to it. He also never sought to use the education and training he received in prison which resulted in his obtaining a Master's of Professional Studies, a theology degree.

Claimant testified that he "enjoyed" his Seaport Museum job, and because he had a hard time sitting and concentrating in a closed setting after his incarceration, "I prefer to work outdoors." For close to four years claimant appeared altogether content in the new, productive career he had forged. There is no evidence he still yearned to return to his pre-conviction publishing-related work and earnings capacity. Then came an unfortunate intervening setback. He was laid off in June 2004 because of budget cutbacks at the Seaport Museum. Apparently this did not, however, rekindle a desire on his part to renew his search for Editor II-type employment or anything comparable to it. Rather, after collecting unemployment for a short period of time, claimant settled into a job as a parking lot attendant adjacent to the Seaport where later he rose to be its manager, his current position.

The apparent explanation claimant offered at trial for this behavior is that his conviction continues to make Editor II-type employment unattainable for him, especially because his psychological problems persist. Dr. Dudley testified that claimant exhibited "avoidance behavior" and "symptoms of numbing of general responsiveness," elements of claimant's PTSD to which the doctor also opined. He explained this is why claimant took refuge in occupations near his home where people would not ask many questions about his past and where his work would not be so demanding. But Dr. Dudley never rendered a persuasive opinion that either claimant's alleged PTSD or any of the psychological issues comprising it (*see discussion of Post-Incarceration Psychological Problems, infra*) is what would prevent claimant from effectively seeking, finding or engaging in the kind of work he did at Bowker or any related field for the remainder of his future work life – or for any finite portion of it for that matter. Dr. Dudley's unpersuasive testimony is coupled with claimant's failure to adduce testimony from a vocational rehabilitation expert as to claimant's "vocational profile" of what jobs actually are available to claimant in the New York area given his education and skill set were he not impaired by his conviction and psychological problems as alleged, and to what jobs and income level he ostensibly is relegated for the remainder of his work life because of his allegedly impaired state.

Claimant thus is left with an entirely circumstantial argument, that is, because he was an editor before his incarceration and a parking lot manager after, it follows that his unjust conviction has caused what will be a lifelong earnings deficit. Claimant has not persuaded the court this is the case. The court has found that when claimant was able to land the Seaport job he had overcome the most severe elements of the depression caused by his conviction/incarceration which previously had prevented him from gaining meaningful, steady employment. The evidence is that ultimately he became happily ensconced in his South Street Seaport career, never again having sought publishing-related work. When claimant was laid off due to Seaport budget cutbacks – an independent, intervening event – he then voluntarily chose a nearby parking lot job. At trial, he explained he felt it would be impossible for him to work again in publishing or any other work which required attention to detail ("I can't do that."). Perhaps. Equally plausible, however, is that claimant no longer *wanted* to pursue an Editor II-type career. And more than 15 years after claimant's release from prison, the court finds that whichever explanation more accurately captures claimant's current 'psychology', it is far too

attenuated to his conviction/ incarceration as a matter of proximate cause to hold defendant responsible for any earnings deficit claimant may experience for the remainder of his work life (*cf. Matter of Leo v Regan*, 115 AD2d 104, 105 [3d Dept 1985]). The court thus concludes claimant's claim for future lost earning capacity is speculative and unsustainable.

Claimant's pecuniary damage claim also seeks the costs of future psychotherapy for the balance of claimant's life, predicated on Dr. Dudley's opinion that claimant would benefit from such treatment. While the court has accepted Dr. Dudley's view that claimant suffered real psychological issues resulting from his incarceration, the court finds claimant has not proven that the lingering psychological problems claimant now grapples with and which Dr. Dudley opines could be allayed with psychotherapy are primarily attributable to his conviction/incarceration as to warrant an award of future psychotherapy costs.

Non-Pecuniary Damages. The court turns to claimant's claim for non-pecuniary damages. These are comprised of the damages claimant suffered during his period of incarceration following conviction; and then those he suffered following his release which resulted from his unjust conviction and incarceration. In the first category, the "principal elements" of damages include "loss of reputation, mental anguish and, above all, the loss of liberty." (*Reed v State of New York*, Claim No. 071650, October 18, 1988, Orlando, J.). The mental anguish suffered by an inmate while he is in prison encompasses his discomfort, fear, lack of privacy and degradation. It is distinct from the continuing type of emotional damage he may suffer after his release from prison. (*Carter v State of New York*, 139 Misc 2d 423 [Ct Cl 1988], *affd* 154 AD2d 642 [2d Dept 1989]). In this case, there is also a significant damage component for claimant's loss of the relationship with his daughter (*see* cases cited, *supra*).

Mental Anguish/Degradation. Claimant and his wife Lillian both testified as to claimant's shock and utter disbelief at the moment he was convicted. He never believed it would happen. Disheveled and in tears, "it just destroyed him," recounted his wife. Having been found guilty, he was carted off to prison. In *Campbell v State of New York*, 186 Misc 586, 588 (Ct Cl 1946), Presiding Judge Barrett described the angst and humiliation suffered by another innocent man thus unjustly incarcerated:1**[1]**

> [C]laimant suffered grievously during his long term in prison . . . for the commission of crimes of which he was innocent. He was branded as a convict, given a prison number and assigned to a felon's cell. He was deprived of his liberty and civil rights. He was degraded in the eyes of his fellow men. His mental anguish was great by reason of his separation from society and his wife and family. . . . He suffered the miseries of prison life and his confinement was doubly hard because he was innocent.

Here, claimant stresses the heinous nature of the crimes against his own 4-year old daughter of which he was unjustly convicted: two counts of rape in the first degree, two counts of sodomy in the first degree, four counts of sexual abuse in the first degree, two counts of incest and three counts of endangering the welfare of his own 4-year old daughter. There is no question the nature of this particular conviction further exacerbated claimant's mental anguish. Claimant explained, for example, that he was thrust into prison as a convicted "tree jumper," a child rapist, the lowest of low in prison society. He described how he well understood that "(i)f anybody [learned] that there was a tree jumper in the tier . . . he wouldn't make it." In prison, convicted child molesters were raped or murdered or both, and claimant was acutely aware of what he might face. He was "afraid for his life" from the day he arrived in prison until the day he left. He slept with his head next to the metal toilet in his cell to avoid being attacked from

outside the bars. That claimant's sentence presented this innocent man with the prospect of having to endure 8-1/3-25 years of this mental torture compounded the anguish he was made to experience.

The court also recognizes the toll the heinous nature of these crimes of moral turpitude has taken on claimant's reputation. (*See Reed v State of New York*, NYLJ Nov. 7, 1988 at p. 24, where Judge Orlando of this court found it "axiomatic" that a claimant unjustly convicted of murder suffered an especially great loss of reputation. As Magistrate Judge Henry Pitman observed in *Komlosi v Fudenberg*, 2000 U.S. Dist. LEXIS 4237 [SDNY 2000]: "The special opprobrium society has for sex offenders is evidenced by *New York Corrections Law §168-c et seq.* which requires the registration of sex offenders and public notice of their presence in a community. No similar requirements are applicable to convicted murderers, contract assassins, bombers, robbers, arsonists, burglars, violent muggers or narcotics traffickers who sell drugs to minors." [n 11] Claimant surely is entitled to compensation for the societal degradation he has been made to suffer, of which this statute is emblematic.

Loss of his Daughter. The court takes account of claimant's tragic loss of the relationship with his daughter, Anna. As her father, claimant enjoyed an extraordinarily loving and close relationship with Anna literally from the day she was born through the first four years of her life. For most of that time claimant was Anna's primary caregiver as his ex-wife Katherine pursued a college education, and then a demanding career which prevented her from providing the parental care that claimant was in a position to provide to Anna. It was only after the couple's marital difficulties ripened into a divorce and custody/visitation battle over Anna that Katherine lodged sexual abuse charges against claimant, inflamed by the hostility of Katherine's mother. While the decree pertaining to visitation and the order of protection stemming from Katherine's false charges of child molestation sowed seeds for the potential disintegration of the close father-daughter relationship, it was claimant's unlawful conviction that extinguished the chance for a resumption of that relationship. As claimant's wife Lillian testified, claimant's heart was broken.

Defendant argues that claimant has not proven it was the conviction itself which was primarily responsible for the end of claimant's relationship with his daughter because it already had been damaged, "perhaps immeasurably and irretrievably, prior to his arrest, let alone conviction." Defendant's Post-Trial Brief at 22. The court does not agree. At the time Katherine filed for divorce in 1987, she had moved out of the marital residence, leaving Anna behind with claimant. In the fall of 1987, Katherine was awarded temporary custody of Anna pending conclusion of the divorce action. Thereafter, Anna lived in Pennsylvania with her mother and her maternal grandparents and was brought to New York each Saturday morning for weekend visitations with the claimant. Claimant only began to have difficulty with Katherine over these weekend visitations after she tried to prevent him from seeing the child. This forced him to go to court to enforce his weekend visitation rights. Katherine was held in contempt by the court and directed to comply with its prior visitation order. She complied with the court's directive, but in mid-February 1988 Katherine lodged her sexual abuse accusations. The Supreme Court order which terminated claimant's visitation rights as of February 25, 1988, did so only until the abuse accusations were resolved. (Ex. 24) Claimant next saw Anna when they were together at Dr. Eshkenazi's office for a court ordered psychological examination on March 10, 1988. There, despite the allegations, Dr. Eshkenazi observed a warm, affectionate relationship between father and daughter, with Anna sitting on her father's lap. Even after she made some negative statements about him in the doctor's private interview with her (which the doctor suspected were the product of Katherine's and the

grandmother's attempts to poison the relationship), Anna stopped in the middle of the interview to go out and hug her father in the hallway. The doctor concluded that he had "serious doubts" Anna had been sexually abused by her father.

The sexual abuse allegations also led to a Family Court proceeding in which an inquest, following claimant's default when he left the country to visit his sick father, resulted in a Family Court finding that claimant had sexually abused his daughter. This finding, however, was based in large part on the testimony of the same Dr. Sabbagh of the New York City Department of Health who falsely testified at claimant's criminal trial that Anna had been sexually assaulted. Claimant thus was ordered not to have any contact with Anna until she attained the age of 18. Only after claimant's criminal conviction was overturned was the doctor's testimony shown to have been erroneous.

The court concludes it is reasonable to infer that but for claimant's unjust conviction and imprisonment he would have obtained *vacatur* of the Family Court's protection order which had been procured upon his default. The evidence reveals a close and loving father-daughter relationship between claimant and Anna. Although that relationship had been placed in jeopardy by his wife's malicious allegations of sexual abuse (credited by the Family Court based on Dr. Sabbagh's false testimony), it was claimant's conviction and incarceration that shut the door on any chance claimant had to quickly resuscitate it. Anna was still young enough at that point not to have appreciated the import of these erroneous charges nor to have suffered psychological scars from them.

The court also finds it can be reasonably inferred that even after claimant's wrongful conviction had been overturned, the stigma and lingering doubt the conviction had engendered adversely affected how the New York City Department of Social Services and the court-appointed law guardian both reacted to claimant's efforts to remove the Family Court's order of protection. They continued to resist his efforts long after the charges against him were dropped. Mr. Wessel convincingly testified to the extraordinary efforts it took to overcome the institutional skepticism which compounded repeated instances of bureaucratic ineptitude in losing the court file, until he finally was able to obtain for claimant the right to contact his daughter. As noted *supra*, on July 5, 1995, Mr. Wessel was successful in vacating the original order granted by the Family Court in 1988, and that decision was affirmed by the Appellate Division on January 29, 1996. (Exs. 16 and 17) The order of protection which had been issued by the Supreme Court, Queens County when claimant's conviction was overturned remained in force only for the duration of any retrial of claimant. (Ex. 21B) It lapsed by its terms once the District Attorney announced he would not again prosecute claimant. Because the Family Court order of protection remained, however, the law guardian refused to permit claimant to have access to his daughter without another court order directing so. It was not until July 24, 1997, that Mr. Wessel was able to get Judge DePhillips of the Family Court to issue such an order withdrawing the original petition for protection in his court, with prejudice. (Ex. 18) Even as Judge DePhillips commented on how very sad it was that claimant had been precluded from having access to his daughter, he nevertheless recommended that claimant not approach her directly but only through the law guardian due to the strong likelihood she would not want anything to do with him after the passage of so many years.

In accordance with Judge DePhillips' recommendation to proceed through the court-appointed guardian, claimant tried to contact Anna by having Mr. Wessel work with the law guardian. These efforts proved unsuccessful. Ultimately, claimant chose to approach Anna through his son Martin, Anna's half-brother. Martin's efforts proved unavailing when the woman (presumably claimant's first

wife, Katherine) who answered the phone at a residence he believed to be Anna's said Anna did not want to have anything to do with her father. Claimant chose to leave the matter alone, not wanting to appear to be harassing Anna.

Contrary to defendant's interpretation of these events, the court does not view them as proof claimant did not place a great deal of value on his relationship with Anna or that he has not suffered immensely from the loss of that relationship. "She was my heart," he explained. On the contrary, it seems realistic for claimant to have accepted the fact that not having seen Anna since she was a young child, he probably never again was going to be part of her life unless she also chose to make that happen. As a result, according to claimant's wife, Lillian, all he is left with today are the memories of his close relationship with Anna in her early childhood, and her toys and drawings which remain a fixture in their apartment. The court concludes it is entirely appropriate to view claimant's loss of his relationship with his daughter as having been proximately caused by his unjust conviction and to include it in determining a fair and reasonable amount of compensation in this case (*see* cases cited *supra* with regard to damages for deprivation of the company of a child). The conviction cannot be separated from what has been the tragic loss of that relationship.

Post-Incarceration Psychological Issues. The court next considers whether claimant is entitled to additional damages because he allegedly suffers from PTSD as a result of his wrongful conviction and imprisonment. Defendant does not contest "that claimant, by whatever diagnosis it is called, suffered after his incarceration, for some time, from psychological readjustment," but contends that beyond that, any claim to PTSD is unproven. Defendant's Post-Trial Brief at 22.

Claimant's PTSD claim was presented through the psychiatric expert testimony of Dr. Dudley who had multiple sessions with claimant and prepared reports for the trial in this case and for the earlier trial in the federal court action. He explained that claimant's certainty the sexual abuse charges against him would be favorably resolved made the shock following his conviction all the more traumatic for him. The doctor noted that claimant's fear for his life while in prison due to the nature of his conviction had compounded his trauma. He pointed out how claimant had changed from a socially well adjusted, outgoing person to one who for the first six months after he was released from prison did not even leave his apartment and became isolated and afraid of crowded places. His sexual relationship with Lillian disintegrated, he had difficulty concentrating and he became afraid of people in uniforms such as the police.

Dr. Dudley concluded claimant had developed chronic (*i.e.* lasting more than 30 days) PTSD, accompanied by a clinically significant depression. His opinion was based on four criteria set forth in the Diagnostic and Statistical Manual of Mental Disorders ("DSM-IV"): trauma, how a person responds to the trauma, characteristics developed after response to trauma and emotional distress and/or impairment in some area of functioning. Dr. Dudley found claimant's condition met all four criteria.

Defendant countered that PTSD is "over diagnosed" and "is the whiplash of psychiatric conditions." Defendant's Post-Trial Brief at 26. Defendant relied on the psychiatric expert testimony of Dr. Nassar. He conducted forensic examinations of claimant in connection with this lawsuit and in the federal court action, and prepared two reports, one in 1996 and the other in 2006. Dr. Nassar opined that claimant does not suffer from PTSD and never has suffered from that condition since his incarceration. He did not find claimant's incarceration to meet the criteria of "trauma" necessary for a diagnosis of PTSD, principally because the evidence does not show claimant ever perceived of his conviction and incarceration as a

threat to his very survival. Claimant was able to cope in prison, as demonstrated by his successful enrollment in the Master's Degree program offered at Sing Sing by the Union Theological Seminary, by his in-prison marriage to Lillian and by using his familiarity with Islam and Arabic to tutor other inmates which provided him with some protection from other prisoners. Dr. Nassar acknowledged the stress of incarceration, but in his view the stress itself does not necessarily result in PTSD. According to the doctor, it is the inability to deal with the stress which causes PTSD, and claimant, to his credit, had the necessary coping mechanisms.

Although on cross-examination Dr. Nassar was shown to be vague and imprecise, and less than thorough and sloppy in recording his examinations of claimant, the court nevertheless concludes that the thrust of his testimony concerning claimant's ability to cope, both in prison and after his release, militates against a finding that claimant ever has suffered from PTSD. The court notes, however, that Judge Weisberg's observations in *Coakley v State of New York*, are particularly apropos to claimant's psychological situation here. *Coakley* involved a claimant who was wrongfully convicted of rape and served a sentence of five and a half years. He claimed he was suffering from PTSD and also presented his claim for this disorder through Dr. Dudley. In *Coakley*, although the State offered no testimony to counter Dr. Dudley, Judge Weisberg nevertheless concluded: "I need not decide whether claimant's maladies satisfy the clinical definition of this disorder. The evidence showed, and I find, that claimant was and is suffering from several, if not all, of its symptoms; that they proximately resulted from the conviction and imprisonment; and that they are probably permanent." The court here finds that the evidence in this case shows claimant has suffered from a number of the symptoms of PTSD; and that these proximately resulted from his unjust conviction.

Loss of Liberty. The Law Revision Commission (the "Commission"), in recommending the enactment of § 8-b, stated in its report to the Governor that imprisonment resulting from the unjust conviction of an innocent person is "'the most serious deprivation of individual liberty that a society may impose' (Livermore, Malmquist & Meehl, On the Justifications for Civil Confinement, 117 U Pa L Rev 75 [1968])." (Commission Report, *supra* at 2903). "Liberty is absolute and the loss of it irreplaceable." (*McLaughlin v State of New York*, 89 NYLJ 25 [Ct Cl,10/27/89], Orlando, J. [citations omitted]).

The court is asked to include in its damages award the value of what really is an incalculable loss; to place itself within the experience of this claimant and follow his every moment, from the time he heard the 'guilty' verdict that extinguished his flame of trust and confidence in a successful outcome born of the certainty of his innocence, to his ensuing despair while incarcerated as a convicted felon in a maximum security prison. At trial, these were claimant's own words on his loss of liberty:

You're stripped of everything that you thought you had on the outside, your civil rights, your name, clothes. You're housed in confinement, cells. Concrete walls, a bar – barred door in the front. You basically did what they told you to do when they told you to do it. You were no longer a thinking individual anymore. You were just a number. We were housed like animals, basically. . . . I couldn't believe that what was happening to me was real. . . . I could – I could not believe that I ended up in a bar – in a cell. . . . Every time you entered or you left the tier, you were stripped [sic] searched. And that entailed stripping off all your clothes, bending over, lifting your testicles, spreading your cheeks, open your mouth. The COs had to look in every orifice of your body to see if there's any contraband, any blades, any – anything that wasn't supposed to be there. . . . It was done in cattle call . . . a dozen of us lined up. They have two or three COs in the back, looking into your butt.

looking into your butt.

Upon conviction, claimant was sent to Downstate Correctional Facility for several months and then transferred to Sing Sing where he was confined for the longest part of his incarceration. This five-tier, caged, maximum security prison where he was housed is reserved for the toughest prisoners serving the longest sentences. His cell was six feet by nine feet, three green-painted concrete walls and a fourth of bars. It had only a bed with a thin mattress, a metal toilet two feet from where his head lay when he slept and a metal sink. Even when he was transferred from there to Eastern Correctional Facility he was unable to avail himself there of the more relaxed privilege of conjugal visits with his new wife, Lillian, because he steadfastly refused to comply with the prison's precondition that he acknowledge responsibility for the crimes of which he had been convicted and did not commit. Whatever measure of human dignity those visits might have afforded thus were also denied him.

While incarcerated, he had been assaulted at Downstate – hit in the face and knocked out – without warning or provocation, by an inmate while they were waiting for a shower. He had to be taken by gurney to a hospital for treatment. At Sing Sing, he lived in constant fear of gang rape and assault in his cell as he had witnessed another inmate repeatedly victimized by this fate while guards stood by without doing anything. He also watched in dread as an inmate was stabbed 50 times with an ice pick ("he had holes like Swiss cheese. . . . blood coming out of . . . holes in his body"); and also saw his fellow inmate, several feet away from him, get violently stabbed in the eye while they both waited for their meals (the "guy's eyeball was hanging down"). He had an overriding fear that he would never get out of prison alive.

In the earlier days of the unjust conviction statute, Judge Adolph C. Orlando of this court eloquently addressed the court's charge in seeking to quantify the loss of liberty in two decisions:

How does one place a price on a fundamental birthright? How can this Court place itself within the experience of the claimant? How does one feel when handcuffed and shackled and placed in a cell as above described? How can a monetary value be placed on the fleeting hope for freedom; the despair that sets in as the iron bars shut behind one? The unmistakable, unforgettable sound that reverberates throughout one's very bones [citation]. How can one replace the emotional contact of loved ones forever gone?

No one can really understand the loss of freedom, liberty so unjustly taken from another, 'COMPRENDERE NON LO PUO CHI NON LO PROVA.' Dante, *The Divine Comedy*.

Reed v State of New York
, Claim No. 71650, filed October 28, 1988.

We are asked to determine the value of the very things we take for granted; the very things we hold dear; the longings, hopes and aspirations. In short, the very essence for this individual's existence. It is as if a man's life has been terminated at one point and then resurrected later; yet with all the intervening traumas, dangers and injuries that will endure, linger and become a permanent part of his life. It is within this set of circumstances that this Court must award damages; stating again that the liberty one so cherishes is absolute and the loss of it a tragedy of incalculable value.

Ferrer v State of New York
, Claim No. 74308, filed June 13, 1990

, Claim No. [illegible], filed June 15, 1999.

The court next turns to this task of placing a monetary amount on the "incalculable," as well as on the other elements of claimant's non-pecuniary damage claim.

Valuation of Non-Pecuniary Damages. The parties adopt starkly divergent views of how the court should arrive at its non-pecuniary damage award. Defendant computes an average of ten Court of Claims decisions or settlements it has selected and asserts they evince "a fairly clear cut standard" which it urges the court to apply: "The formula in settlements/verdicts and appellate decisions is a range, generally, of $100,000 to $125,000 per year of incarceration unless there is [sic] significant reasons to deviate (a prior criminal record, a history of assault and injury in prison) either upward or downward." Defendant's Post-Trial Brief at 24. Claimant, on the other hand, argues there is no such "formula" and stresses the *sui generis* nature of claimant's circumstances here, that is, an educated, well adjusted, professionally successful and innocent man who never had been imprisoned and who, to his horror, found himself convicted of the worst imaginable sexual offense against his own four-year old daughter and given a prison sentence of up to 25 years. Claimant thus urges the court to adopt the "wisdom" of *Carter v State of New York* (139 Misc 2d at 430) that deemed it inappropriate to apply a flat rate in § 8-b cases "given the variations within and between each individual's circumstances."1**[2]**

Claimant also urges the court to begin its valuation with a consideration of the fraudulent and dishonest manner in which he was wrongfully convicted by perjured testimony and the county prosecutor's deliberate withholding of exculpatory evidence. Claimant "was not simply convicted and imprisoned unjustly – he was lynched," plead his counsel. Claimant's Memorandum of Law at 34. It *is* hard to imagine a worse set of circumstances, as recounted first in the Appellate Division's reversal of claimant's conviction and then in its grant of summary judgment on the issue of § 8-b liability. (*See People v Baba-Ali*, *supra*; and *Baba-Ali v State of New York*, excerpted *supra*). But the law was not designed to compensate a claimant for a tort actually committed by the State. Rather, the Commission viewed the State as "the most appropriate party to assume liability" for an unjust conviction even if occasioned by a miscarriage of justice at another level of government, such as an elected *county* District Attorney. It was the Commission's view that because a prosecution is brought in the name of the "People of the State of New York," and the conviction is for an act made criminal by state law "usually with the imprimatur of a state court," and the convicted person generally is confined in a state correctional facility, the nexus between the State and the entire process justifies the State's assumption of what it saw as a moral obligation:

By imposing financial liability upon the State recognition is given to a proposition that would seem to be self-evident, namely that it is the State's obligation, and no one else's, to do what justice and morality demand when an innocent person is convicted of a crime he did not commit (citations omitted).

Commission Report at 2923.

The Commission emphasized that the vast majority of unjust convictions do not result from prosecutorial misconduct but rather "from human frailties that are ineradicable." Commission Report at 2902. The State's assumption of liability is thus absolute and prosecutorial misconduct or whatever else brought about the miscarriage of justice is irrelevant. That the State, laudably, has decided to assume this moral obligation regardless of its fault is no basis, however, for it to argue that awards under § 8-b somehow should be less. This, too, has no place in

argue that awards under § 8-b somehow should be less. This, too, has no place in the court's consideration of its damage award. *See* discussion of defendant's formulaic "standard," *infra*.

The unjust conviction statute gives the Court of Claims wide latitude in arriving at its non-pecuniary damage award to determine what "will fairly and reasonably compensate [claimant]" for an unjust conviction. (§ 8-b, subd 6) The Commission expressly rejected the notion that damages should be limited in amount and/or to certain types, that is, only a pecuniary loss which would have excluded any recovery for such items as "pain and suffering, embarrassment and humiliation." (Commission Report at 2933) It opted instead for "the traditional legal methods of assessing damages:"

Imposition of such restrictions [on damages] is simply untenable in the absence of similar limitations [in] actions against the State. New York should not appear to protect or value property rights or personal injuries to a greater extent than the liberty rights of its citizens. Furthermore, imposing restrictions on the amount and type of damages recoverable is simply contrary to the purpose of the claim. The Commission, accordingly, agrees with the general principle stated in *Hoffner v State of New York* (207 Misc 1070, 1072 [1955]), a case where damages for unjust conviction were sought:

The State, by its brief suggest [sic] that more compensatory than money is the apologetic gesture of a penitent society. It seems to the court that such an apology accompanied by a token payment would add a highhanded insult to an almost inconcievable [sic] injury.

The claimant has been humiliated, degraded, shamed and suffered a loss of reputation and earnings. For this he must be paid, and for this money damages can be compensatory. But all the wealth of the State of New York could not compensate the claimant for the mental anguish suffered through nearly twelve years of false imprisonment, under the impression that he would be there for the rest of his life. How can a man be repaid who has been branded a murderer and whose only hope is an early death to release him from the sentence erroneously passed on him? For this, any award is bound to be a mere token, but it should compensate as well as the medium allows.

Id
. at 2933.1**[3]**

The Commission also forthrightly addressed the potential fiscal consequences to the State of this proposal:

In proposing that the State should assume financial responsibility, the Commission is not unmindful of the potential fiscal impact of successful

actions upon the State. *Indeed, in a particularly egregious case the damages recoverable could be extremely high.*

Id
. at 2925 (emphasis added).

Given the Commission's clearly expressed intent of what a § 8-b damages award may be comprised, the court finds no place for a formulaic approach to its consideration of damages as defendant urges. No two stories in this area of criminal justice are alike. Each individual on whom has befallen such an injustice is entitled to have the circumstances of his damages evaluated as unique to him. There certainly is no basis to apply a "standard" defendant has divined from its selective citation of ten damage awards – far less than half of all § 8-b dispositions, that is, verdicts and settlements, since the statute was enacted

dispositions, that is, verdicts and settlements, since the statute was enacted – seven of the awards in 1989-1998 dollars and none cited with regard to the non-pecuniary damage elements the respective courts specifically addressed in arriving at a decision.1**[4]** Defendant's theory is altogether unpersuasive. The court has conducted its own search and review of the award and settlement data and the judicial opinions available to it for what the court believes to be *all* § 8-b award dispositions in the 24-year history of the statute.1**[5]** The majority of the opinions do not in any way purport to employ any such 'dollars per year of incarceration' evaluation. On the contrary, most of the decisions the court has been able to review appear to arrive at a non-pecuniary award after expressly confirming consideration of the various factors enumerated by the Commission in its report; some courts expressly reject a formula such as the one urged by defendant here, including *Carter v State of New York*, *supra*, one of the cases defendant relies on to support the formulaic standard it argues for.1**[6]**

The court nonetheless is mindful that courts are asked to look to prior awards approved in other, comparable cases in their determination of what is "reasonable compensation." (*See* CPLR 5501[c]; *Walsh v Kings Plaza Replacement Serv.*, 239 AD2d 408 [2d Dept 1997]; *Ramos v Ramos*, 234 AD2d 439 [2d Dept 1996].) Courts do start with the nature of the crime involved in the conviction and the amount of time incarcerated. But their inquiries hardly end there. And on the fully developed record here – the State's liability having been determined by the Appellate Division on a summary judgment motion without the necessity for a trial, then a four-day damages trial involving 10 witnesses including 4 experts – a human tragedy of many facets is revealed which bears slim resemblance to any of the stories the court has been able to review among prior § 8-b decisions. The court thus does not view these prior awards as approaching either in kind or amount what it finds necessary to satisfy the statutory requirement of fair and just compensation for this claimant here.

For claimant's mental anguish and degradation occasioned by being labeled a convicted child molester of his own four-year old daughter; for the irretrievable loss of his relationship with his daughter proximately caused by his conviction; for his loss of liberty into the most fearsome maximum security prison environment that an innocent man with no prior criminal history may be thrust; and for the psychological damage claimant sustained following his conviction, both while incarcerated and post-incarceration as a result of all this, the court finds claimant is entitled to $1.75 million in non-pecuniary damages.

* * *

In sum, the court awards claimant the following:
Past lost earnings $ 343,428.
Non-pecuniary damages $1,750,000.

The total amount of damages awarded to claimant is $2,093,428.

LET JUDGMENT BE ENTERED ACCORDINGLY.

March 16, 2009
New York, New York

HON. MELVIN L. SCHWEITZER
Judge of the Court of Claims

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[1] This damages portion of the case was tried before Honorable Richard E

[1]. This damages portion of the case was tried before Honorable Richard E. Sise, Presiding Judge of the court, on October 24-25, 2006, November 21, 2006 and February 14, 2007. After the trial and post-trial submissions, Judge Sise recused himself; on August 21, 2008 the parties stipulated and agreed to have this court decide the issue of damages based upon the full and complete record (*i.e.* the certified transcript of testimony and the exhibits received in evidence during the trial before Judge Sise) and based upon the contentions set forth in the post-trial briefs submitted to Judge Sise, *i.e.* Claimant's Memorandum of Law, dated June 8, 2007; Defendant's Post-Trial Brief, dated June 8, 2007; and Claimant's Reply Memorandum of Law, dated July 16, 2007.

[2]. Claimant also brought a civil rights action (42 USC §1983) against several defendants, including the City of New York, Dr. Sabbagh's employer. Those portions of the claim based on allegations of negligent supervision and training and malicious prosecution survived a motion to dismiss because, among other reasons, it was alleged that there were at least two other instances in which Dr. Sabbagh's examinations of children were later contradicted by subsequent examination (*Baba-Ali v City of New York*, 979 F Supp 268 [SDNY 1997]). The case was tried and resulted in a jury verdict for defendants. At the damages trial here, Judge Sise noted on the record that he had been informed off the record by counsel that the civil rights action was on appeal but "in a suspended status."

[3]. When asked, Ms. Mullikin stated that she was not a social acquaintance of claimant or his family, although both of them occasionally had gone out for drinks with co-workers and once participated in a golf outing. On one occasion, claimant and a friend had come to her house to perform some work, for which she paid them. She met claimant's first wife, Katherine, only once, at an art gallery opening. She was aware, however, that his wife frequently called the workplace and, on one occasion, she learned of a letter that Bowker management had sent to claimant's wife regarding harassing phone calls she (claimant's wife) was making to a co-worker of claimant's. Ms. Mullikin also posted bail so that claimant could get out of jail in August 1988. Following her departure from Bowker in early 1989, she saw claimant only on those occasions when she testified on his behalf at several trials. On one occasion, he contacted her to ask if she would write a recommendation for him for a job as a census taker, which she did.

[4]. The resumes claimant sent out after his release did not state he had received a degree from the Sorbonne, but they did include a Master's degree he obtained while in prison. His resume did not account for the time he was in prison.

[5]. Dr. Miner developed a similar projection based on an "Editor IV" position, described by ERI as a publications editor: one who "formulates policy, plans, co-ordinates and directs editorial activities," as well as supervises workers and selects and prepares materials for publication. This position carried a 2006 earning level of $98,201. Using the same methodology as described above, he determined the net past lost earnings would be $732,759 and the net future lost earnings would be $1,210,933, working to age 63.

[6]. This was one of the two times claimant saw his daughter alone after February 7, 1988, shortly before the accusations of abuse were made against him. The other time was when she testified at his criminal trial in the fall of 1989.

[7]. On September 14, 1988, an order of protection had been issued on default when claimant failed to appear in the Family Court proceeding due to his having gone to Paris to visit his ill father. After his conviction had been reversed by the Appellate Division, on January 24, 1992, a temporary order of protection was issued by the Supreme Court pending retrial (Ex. 21B) and on February 5, 1992, the court issued a permanent order of protection "for the duration of time this case is pending before the Supreme Court." (Ex. 21C)

[8]. Martin was born in 1979 to a Swedish woman with whom claimant had had a relationship. When claimant learned she was pregnant, he had returned to Sweden and lived with her for about a year but the relationship ended when Martin was less than one year old. Claimant had no further contact with this child until

was less than one year old. Claimant had no further contact with this child until after the attack on New York City on September 11, 2001, at which time Martin's mother tracked him down. She apologized for keeping him away from his son and asked claimant to help Martin, which he has done. Martin spent two summers with claimant, and their relationship now is close.

[9]. Claimant argues his responsibilities at Bowker were closer to an "Editor IV" position as that position is described by ERI (Claimant's Memorandum of Law at 83). The court, however, finds claimant did not establish that he was functioning at that level in 1989 because his position at Bowker did not involve planning and policy, which Dr. Miner testified is what differentiates "Editor IV" from "Editor II."

1**[0]**. The court uses Dr. Miner's methodology set forth in Ex. 14 in determining claimant's lost income for the period from November 15, 1989 through 1999. The court has calculated the income claimant would have earned during that period less what he actually earned as set forth in Ex. 14 to obtain the amount to which claimant is entitled.

[1]1. The *Campbell* claim was one of only five which had been authorized by the enactment of private bills in the State Legislature in the 37 years before the enactment of § 8-b in 1984. *See* Report of the New York Law Revision Commission to the Governor on Redress for Innocent Persons Unjustly Convicted and Subsequently Imprisoned, McKinney's 1984 Session Laws of New York 2899, 2914 ("Commission Report"). The private enactment in *Campbell* (L 1955, Ch 841) authorized the Court of Claims to award "damages, including loss of earnings and compensation for the indignities and shame and humiliation and loss of liberty and civil rights and the degradation and loss of reputation and the mental anguish suffered" as a result of the wrongful conviction and imprisonment. *See* "Valuation of Non-Pecuniary Damages," *infra*.

1**[2]**. He submits, however, that if the court should opt to rely on a formula, it should look to the decision of Judge Sterling Johnson in the U. S. District Court for the Eastern District of New York, *Hyatt v United States of America*, 91 CV 0711 (July 14, 1997), where, in a Federal Tort Claims Act case for false arrest and false imprisonment which applied Illinois law, the court awarded the plaintiff $3,000 a day for each of the 99 days he was falsely imprisoned [$1.1 million per year] (Claimant's Reply Memorandum at 13). In this vein, a more recent case under 42 U.S.C. § 1983 involving false imprisonment claims, *Limone v United States of America*, 497 F Supp 2d 143 (D Mass 2007), surveyed a number of damage awards and found $1 million for each year of imprisonment to be an appropriate amount.

1**[3]**. The *Hoffner* decision pertained to a claimant who had served 12 years after having been wrongfully convicted of first degree murder based on an "erroneous and inadequate" eyewitness identification. The conviction was overturned because the district attorney's office had suppressed certain evidence favorable to claimant which existed at the time of trial. The State Legislature had enacted a private bill specifically authorizing the Court of Claims to hear claimant's damage claim. (L1955, ch 841). The statute waived the State's immunity from liability and consented to a "valid and legal claim against the state" for "damages, including loss of earnings and compensation for the indignities and the shame and humiliation and loss of liberty and civil rights and the degradation and loss of reputation and the mental anguish suffered by claimant as a result of and in connection with his erroneous conviction and imprisonment." This statutory language was the same as that adopted by the legislature in 1946 when it first enacted a private bill for these purposes, claim of *Campbell* (L1955, ch 841). *See Campbell v State of New York* and n 11, *supra*.

1**[4]**. To come up with its "standard," defendant apparently divided each damage award by the number of months of incarceration and multiplied the result by twelve to arrive at a per annum amount. Then it *averaged* the amounts of the ten awards. This methodology treated each award as if it were a fungible commodity and ignored the differences in kind and amount (both higher and lower) even within defendant's limited sampling. The actual "per annum" range *before*

averaging, even within defendant's limited sampling, is $22,000 to $216,000 including two of its own settlements of $156,000 and $166,000. *See* settlement data n 15, *infra*.

1**[5]**. To the best of the court's knowledge based on the Clerk's information and data, there have been 18 adjudicated award dispositions, and 32 settlements of which four occurred after a finding of liability. They are:

Verdicts: *Reed v State of New York*, Claim No. 071650, 1988 ($450,000 non-pecuniary damages); *Carter v State of New York*, Claim No. 073351, 1988 ($200,000 non-pecuniary damages; express rejection of formula); *McLaughlin v State of New York*, Claim No. 075123, 1989 ($1.5 million non-pecuniary damages); *Grimaldi v State of New York*, Claim No. 070838, 1989 ($60,000 non-pecuniary damages); *Reyes v State of New York*, Claim No. 073249, 1990 (apparent formula, 5 months incarceration, $55,000 non-pecuniary damages); *Ferrer v State of New York*, Claim No. 074308, 1990 ($1.56 million non-pecuniary damages; settled on appeal $1.2 million); *Smith v State of New York*, Claim No. 077593, 1990 ($687,500 non-pecuniary damages; settled on appeal, $500,000); *Ivey v State of New York*, Claim No. 070708, 1991 ($450,000 non-pecuniary damages); *Johnson v State of New York*, Claim No. 073998, 1992 ($40,000 non-pecuniary damages); *Black v State of New York*, Claim No. 074203, 1992 ($45,000 non-pecuniary damages; express rejection of formula); *Solomon v State of New York*, Claim No. 074202, 1992 ($150,000 non-pecuniary damages); *Cleveland v State of New York*, Claim No. 074204, 1992 ($40,500 non-pecuniary damages; express rejection of formula); *Nieves v State of New York*, Claim No. 080508, 1993 ($200,000 non-pecuniary damages); *Coakley v State of New York*, Claim No. 077025, 1994 ($450,000 non-pecuniary damages); *Hoc v State of New York*, Claim No. 080153, 1995 (apparent formula, 16 mos. incarceration, $125,000 non-pecuniary damages); *Kotler v State of New York*, Claim No. 086653, 1997 (express adoption formula, 128 months incarceration, $1.335 million non-pecuniary damages; also compares its per annum award with two other cases, *Carter* and *McLaughlin*, even though *Carter* expressly rejects formula and *McLaughlin* does not use one); *Jackson v State of New York*, Claim No. 084611, 1998 (apparent formula, 35 months incarceration, $300,000 non-pecuniary damages); *Ortiz v State of New York*, Claim No. 096390, 2000 ($500,000 non-pecuniary damages).

Settlements: *Wimes v State of New York*, Claim No. 079362, 1992 ($6,750); *Chapman v State of New York*, Claim No. 076806, 1993 ($50,000); *Lumpkins v State of New York*, Claim No. 079529, 1994 ($15,000); *Mason v State of New York*, Claim No. 078104, 1994 ($100,000); *Callace v State of New York*, Claim No. 086694, 1994 ($450,000); *Padgett v State of New York*, Claim No. 088783, 1995 ($62,500); *Argueta v State of New York*, Claim No. 091484, 1996 ($15,000); *Langford v State of New York*, Claim No. 085007, 1997 ($55,000); *McCord v State of New York*, Claim No. 093656, 2000 ($350,000); *Chalmers v State of New York*, Claim No. 094177, 2000 ($875,000); *Hobbs v State of New York*, Claim No. 097082, 2000 ($7,500); *Braunskill v State of New York*, Claim No. 097685, 2001 ($850,000); *Blake v State of New York*, Claim No. 099728, 2001 ($1.25 million); *Rojas v State of New York*, Claim No. 100601, 2001 ($550,000); *Cruz v State of New York*, Claim No. 085915, 2001 ($150,000); *Jenkins v State of New York*, Claim No. 101902, 2002 ($2 million); *Lantigua v State of New York*, Claim No. 099044, 2002 ($300,000); *Crosby v State of New York*, Claim No. 104028, 2003 ($450,000); *Faison/Sheperd v State of New York*, Claim No. 104592, 2003 (each $1.65 million); *Warner v State of New York*, Claim No. 104026, 2003 ($2 million); *Palmer v State of New York*, Claim No. 105079, 2003 ($17,500); *Burt v State of New York*, Claim No. 107281, 2005 ($775,000); *Mercer v State of New York*, Claim No. 108360, 2005 ($800,000); *Scott v State of New York*, Claim No. 107647, 2006 ($100,000); *O'Donnell v State of New York*, Claim No. 104340, 2006 ($300,000);

Pichardo v State of New York, Claim No. 106211, 2006 ($200,000); *Morales/Montalvo v State of New York*, Claim No. 105766, 2007 (each $1.1 million); *Vera v State of New York*, Claim No. 102187, 2008 ($640,000); *Harrison v State of New York*, Claim No. 110386, 2008 ($250,000); *Harris v State of New York*, Claim No. 105724, 2008 ($3.01 million); *Niver v State of New York*, Claim No. 106770, 2008 ($12,000); *Brown v State of New York*, Claim No. 113684, 2009 ($2.6 million).

There has been no adjudicated damage award since the year 2000, but defendant has entered into 24 settlements since that year ranging from $12,000 to $3 million. Unlike adjudicated awards, a lump sum settlement does not allow for an analysis of whether the existence of a pecuniary damage claim in a given case may have been significant in arriving at the settlement amount. With this caveat, even applying defendant's 'per annum of incarceration' theory–which the court rejects–to defendant's own 15 most recent settlements reveals that one-third of these dispositions exceed the "standard" defendant urges here by up to 200 per cent.

1**[6]**. In *Carter v State of New York*, *supra*, the court said: "As to defendant's flat rate argument, per unit damage assessments have not generally been accepted in this State (*cf., e.g.* 1 PJI2d 629; *cf. also, Tate v Colabello*, 58 NY2d 84, 88) and, in any event, we deem such inappropriate given the variations within and between each individual's circumstances and course of imprisonment (*cf., e.g. Fisher v State of New York*, Ct Cl, Rosetti, J., cl. No. 70564, filed Jan. 13, 1986, at 8)." In *Cleveland v State of New York*, *supra*, the court said: "These [non-pecuniary] damages are not susceptible to a simple mathematical formula of annualized amounts." And in *Black v State of New York*, *supra*, the court said: "I do not find that damages of this sort can be simplistically reduced to a mathematical formula of annualized amounts."